

# Will This Case Settle? An Exploration of Mediators' Predictions

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I. INTRODUCTION

Will these parties reach an agreement? Inside the heads of most mediators, this question arises at one point or another. Mediators differ on the ways in which they go about answering that question. Some explore the question very systematically, using a sophisticated model for analyzing the substance of the dispute. Some place primary importance on the behavior or communication patterns of the disputants. Others base their assessments largely on instinct, experience, or “gut feel.” Still others explore the answer only at the subconscious level, and some may fight the urge to answer it altogether. Most mediators at least consider this question—forming a prediction about the likelihood of settlement in a case.

This Article explores how mediators treat the question of prediction—their internal assessment of how likely it is that the disputants will reach an agreement. It begins by offering a definition of “prediction” in the context of mediation and offers a framework for understanding the basic dynamics under consideration. Rational and non-rational influences on parties’ behavior make prediction an uncertain enterprise in virtually all cases. Recognizing this, this Article then considers potential impacts if a mediator were to share her<sup>1</sup> predictions with the disputants. To do this, this Article explores four different “stories,”<sup>2</sup> each of

<sup>1</sup> As a convention for handling gender-linked pronouns, I will consistently refer to the mediator as “she,” and to each of the parties as “he.”

<sup>2</sup> The “stories” are simplifications of actual mediations I have conducted, observed, or learned about during interviews with practicing mediators. Each has been cleansed of any information that might identify the actual parties or nature of the dispute. As you will note, the information that has been removed—most particularly the substance of the disputes—is not important. What is important is the dynamic observed by the mediators, their predictive comments, and the apparent impact of those comments.

## AN EXPLORATION OF MEDIATORS' PREDICTIONS

which describes a mediation in which a mediator formulates a prediction and then signals it to the disputants. The disputes considered in each story have been simplified for purposes of illustration and reflection.

The first two stories consider accurate mediator predictions—instances when a mediator's prediction matches the ultimate outcome of the mediation. In the first story, the mediator formulates an “optimistic prediction”—a belief that the case will settle. She shares it with the parties, and in fact, the case winds up settling. In the second story, the mediator forms and shares a “pessimistic prediction” in a case that eventually fails to settle. What might explain the mediator's accurate prediction? One possible answer is a passive assessment of prediction. It suggests that the mediator is a well-informed observer who has simply run her calculations correctly. The sharing of her conclusion, by this explanation, has no impact on the outcome of the dispute itself. A second possible answer is a causal one. In the first story, it suggests that by sharing her prediction, the mediator induced behavior from the parties that was conducive to settlement. That is, the fact that the mediator in the first story shared an optimistic prediction with the parties made their settlement more likely than it would have been without any prediction signal. In the second story, it is possible that the mediator's pessimistic prediction signal caused, in part, the non-settlement she predicted.

Perhaps more interesting are the final two stories, in which the mediator's prediction proves to be inaccurate. The third story involves a mediator who thought that a case would not settle, told the parties as much, and then watched as the parties arrived at an agreement. In the final story, a mediator believes that a case is destined to settle and shares that belief with the parties, only to see the talks fall apart. In seeking to explain why this might happen, it is important to recognize that the mediator may have merely miscalculated the likelihood of settlement. The information on which a mediator bases her prediction is tremendously complex, and it is not static throughout a mediation. Mediators will sometimes predict poorly. It is also possible, however, that the mediator's prediction signal caused a change in the parties' behavior. This Article explores several reasons why parties may, upon hearing a mediator's pessimistic prediction, change their behavior in a way that is conducive to settlement. Similarly, there are reasons why optimistic predictions may, counter-intuitively, encourage behavior that makes settlement less likely.

Each of the above stories assumes that the mediator signals to the parties the prediction she actually holds. In practice, there may be reasons mediators will choose to send a false signal—suggesting that settlement is likely when in fact the mediator believes it is unlikely, or vice versa. While there are a number of possible explanations for mediators' misrepresentations around prediction, there are also considerable ethical and functional implications of such decisions.

While recognizing that the inquiry around mediation prediction is only in its infancy, this Article offers several observations about the practice of prediction formulation and prediction signaling. How certain must a mediator be before she formulates or signals a prediction? At what point in the mediation should she consider predictions? What options does she have in formulating her predictive statement or signal if she wants to maximize the impact of her prediction? Ultimately, this Article suggests that prediction can constitute an appropriate and helpful service a mediator might provide to disputants.

Prediction practice is certainly not a central part of current mainstream conceptions of mediation. It is one of many stones yet unturned regarding mediation practice. Still, there are a number of predictable objections to its inclusion or consideration within the concept of "good mediation." This Article explores some of those objections to mediator prediction, offers some tentative responses, and suggests the need for further exploration of the concept of mediators' predictions.

## II. "PREDICTION" DEFINED

For purposes of this Article's analysis, the term "prediction" refers to one very specific thing: the mediator's assessment of the likelihood of settlement. Prediction does not mean a guess as to the particular outcome or point of settlement (*e.g.*, "I think the parties will settle on \$30,000"). Prediction also does not intend to speak to what outcome would likely be imposed by a non-party in the absence of a resolution (*e.g.*, "I think a court would grant the defendant \$10,000"). Instead, the term prediction describes only the mediator's sense of whether or not the parties will arrive at a settlement in the dispute.

This Article describes prediction within the context of the mediation of a discrete and finite dispute. This is certainly not the only context in which mediation is appropriate. It is not even the only context in which prediction may be appropriate. This Article restricts its discussion to such contexts, however, because it is easiest to describe the dynamics in terms of basic frameworks from the traditional negotiation literature. For example, the analysis in this Article does not aim to consider a situation like a marriage or the formation of a partnership because it would be senseless to speak of the outcome in such situations in terms of settlement.<sup>3</sup> Instead, this Article considers disputes or other discrete transactions in which the parties may or may not reach a resolution on the full set of issues in question. Such situations may permit the formulation of

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<sup>3</sup> Prediction might apply, however, in the context of divorce—a situation in which it would be reasonable to believe that all of the outstanding issues in dispute had been resolved.

a clean prediction—the assessment of the likelihood that the parties will, in fact, reach a resolution on all of those issues.

### *A. Formulating Predictions*

There are many different bases on which a mediator might formulate her prediction. Indeed, there has been no empirical research on the descriptive question of how practicing mediators assess the likelihood of settlement in various situations. Still, it is safe to imagine that a mediator's training, style, and stance toward mediation will color the way in which she formulates a prediction. Some mediators will favor heavily analytic approaches to considering the substance of the dispute. Others will look more closely at the ways in which the parties are framing the dispute, how they are communicating with each other, and the degree to which they appear intransigent. This Article does not aim to answer the question of *how* mediators should formulate predictions, and instead recognizes that there may be many different leading indicators of the likelihood of settlement.

To illustrate the concept of prediction in the context of a mediation, the example immediately following is modestly analytic in nature. The example does not provide any information about the mediator's assessment of the affect between the parties, their communication patterns, or any other non-quantifiable aspect of bargaining. In that sense, the example is more limited than the methods most practicing mediators use to formulate predictions, and it is not intended to be normative. Instead, it is designed to offer a simple basis for illustrating the concept of prediction.

Consider an overly simplified dispute<sup>4</sup> in which there are two parties:  $\Pi$  and  $\Delta$ . Party  $\Pi$  is the plaintiff, the one making a claim for payment. Party  $\Delta$  is the defendant, the one from whom Party  $\Pi$  is seeking payment. In this case, assume also that there is only one issue: the amount of money  $\Delta$  is to pay  $\Pi$ . All other

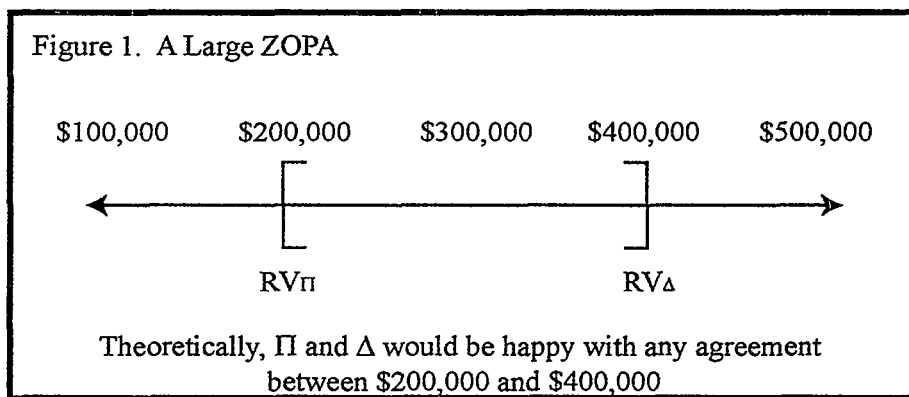
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<sup>4</sup> The concept of prediction may apply to mediation in a deal-making context as well as to dispute resolution. Currently, however, mediation is most commonly practiced in a dispute resolution forum, and this context provides the simplest examples to illustrate prediction formulation and signaling. For an interesting treatment of the question of neutrals serving as brokers in deal-making contexts, see Scott Peppet, *Alternative Deal-Making: The Use of Lawyer-Neutrals in Transactions* (Jan. 30, 2000) (discussion draft, on file with author).

terms have been fixed or are irrelevant. Assume that the question is purely a distributive one.<sup>5</sup>

For purposes of setting up a simple preliminary case for consideration, assume also that  $\Pi$  and  $\Delta$  have not spoken with each other in advance of the mediation. The parties, therefore, know nothing about each other's perceptions of the case. Both  $\Pi$  and  $\Delta$  have spoken with the mediator privately, however, and each has candidly<sup>6</sup> revealed his perspective on the dispute. During those conversations, each party revealed his reservation value—the price point beyond which he would be unwilling to make an agreement.<sup>7</sup> I will label the plaintiff's and the defendant's reservation values  $RV_{\Pi}$  and  $RV_{\Delta}$ , respectively.

Imagine that the information collected by the mediator revealed the situation described in Figure 1. The plaintiff,  $\Pi$ , would be willing to settle the case for any amount greater than \$200,000. The defendant,  $\Delta$ , would be willing to pay up to \$400,000 to settle the case.



<sup>5</sup> This case description parallels, in most respects, what Howard Raiffa refers to as “the canonical case of distributive bargaining.” HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 56 (1982). It differs from Raiffa’s highly structured bargaining scenario in that it does not provide for probabilistic distributions of the parties’ reservation values. I have never encountered a case meeting these simplifying assumptions in my own experience, and I believe they must be rare. Nevertheless, such constraints on the baseline hypothetical permit cleaner calculations, and I will adopt them for these purposes.

<sup>6</sup> This Article will consider later the complications posed by partial disclosure or intentional misrepresentation. For now, assume that the parties disclose fully and honestly those things indicated in exchanges between the mediator and parties.

<sup>7</sup> For a useful, introductory discussion of the term “reservation value,” see ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: HOW LAWYERS HELP CLIENTS CREATE VALUE IN NEGOTIATION* (forthcoming 2000); see also DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 119 (1986). Some authors have adopted the term “reservation price” to signify the same thing. RAIFFA, *supra* note 5, at 44–51.

In this case, the “zone of possible agreement” (ZOPA)<sup>8</sup> between the parties’ reservation values is large. Any settlement option between \$200,000 and \$400,000 would be superior to both parties’ reservation values.

Is this case likely to settle? If one assumes that the parties are economically rational, that the dispute is a single issue distributive case and that no additional information or issues will emerge, a case like this one should settle. It would be reasonable for a mediator with access to the information described in Figure 1 to formulate an optimistic prediction—one that suggests that settlement is likely.<sup>9</sup>

In a mediation involving human parties, rather than simplified and economically rational actors, a mediator might reasonably conclude that she does not have enough information to formulate a prediction with certainty. Psychological or emotional issues may prevent the parties from objectively evaluating the merits of a proposal.<sup>10</sup> The parties may lack the experience or creativity to discover the full range of possible settlement options. One party or the other may lock himself into a value-claiming negotiation strategy that precludes commitment on an otherwise efficient and acceptable proposal.<sup>11</sup> There may be principal-agent issues or constituents’ interests that cloud the calculation.<sup>12</sup> Organizational or structural constraints may prevent appropriate communication or decision-making processes.<sup>13</sup> The interpersonal dynamic

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<sup>8</sup> Howard Raiffa originally employed the terms “zone of agreement” or “potential zone of agreement” to describe the range within which the parties might agree on an option that is superior to each party’s reservation value. RAIFFA, *supra* note 5, at 44–51. This Article adopts the label “zone of possible agreement” or “ZOPA,” as described by Professor Mnookin. MNOOKIN ET AL., *supra* note 7.

<sup>9</sup> The use of a normative label such as “optimistic” or “pessimistic” to describe mediation outcomes risks overstating the importance of settlement in a mediation context. Indeed, some mediation scholars have suggested that a mediator who aims solely to produce settlement risks inappropriately influencing parties’ decisions and prejudicing parties’ interests. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the ‘Grid’ Lock*, 24 FLA. ST. L. REV. 985, 991–92 (1997). I elect to use the terms here because they strike me as the most elegant (word-efficient) way of communicating the concepts of believing that a case will or will not settle.

<sup>10</sup> Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 27–42 (Kenneth J. Aarow et al. eds., 1995).

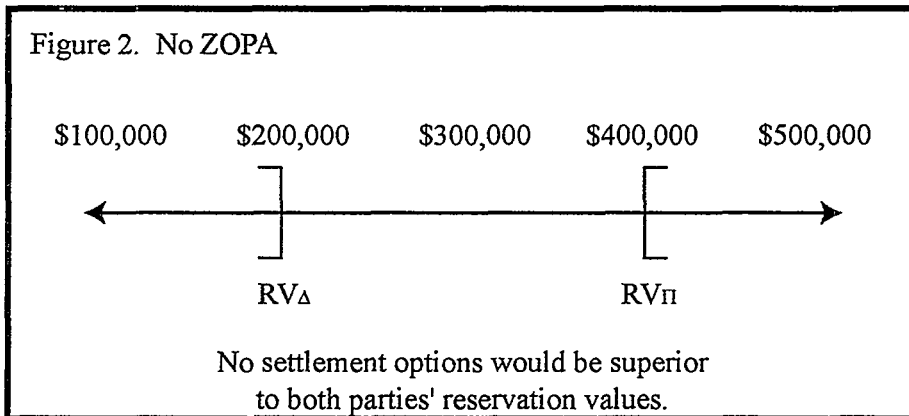
<sup>11</sup> The strategy of making commitments can yield important competitive advantages to a bargainer, provided certain conditions are met. THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 22–28 (1960). However, such commitments may also preclude further exploration of options for joint gains.

<sup>12</sup> MNOOKIN ET AL., *supra* note 7, at 73–91 (describing the negotiation tensions between principals and agents).

<sup>13</sup> Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS TO CONFLICT RESOLUTION, *supra* note 10, at 19–20.

between the parties may not be conducive to settlement. There simply may not be a “positive mood” in the room.<sup>14</sup> And the list goes on. Any of these factors could create a condition in which the parties would fail to agree to a settlement option which appears rationally to be superior to both parties’ reservation values. Absent full information about this range of factors, a mediator might be less than certain about her assessment of the likelihood that the case will settle.

Consider the situation if the parties had different reservation values, ones that created no ZOPA.<sup>15</sup> In this scenario,  $\Delta$  is willing to pay up to \$200,000 to settle the claim, while  $\Pi$  will not accept less than \$400,000.



In this case, no possible settlement option would provide both parties with more value than their walkaway alternatives. If this were a dispute between two human negotiators, a mediator might consider whether one or both might later change his reservation value, or whether there might be some way to create value by adding issues beyond merely the amount of payment or through some other

<sup>14</sup> Some experimenters have discussed the favorable impacts of a “positive mood” on integrative performances by the parties. E.g., Peter J. Carnevale & Alice M. Isen, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation*, 37 *ORG. BEHAV. & HUM. DECISION PROCESSES* 1, 2–4 (1986) (arguing that positive affect promotes integrative bargaining behavior).

<sup>15</sup> See *infra* fig. 2.



means.<sup>16</sup> For now, however, assume that because of the single-issue nature of the case, nothing will (or can) happen during the course of discussions between the two parties that would create value<sup>17</sup> or affect the parties' reservation values.<sup>18</sup> Economically rational actors would not agree to something inferior to their own reservation values, and they would produce no settlement in this case. It would be entirely reasonable for a mediator in a case like the one described in Figure 2 to formulate a pessimistic prediction—one which concludes that it is unlikely that the parties will reach an agreement.

Prediction is a function of the information available to a mediator at a given point in time in the mediation. A mediator might formulate a prediction at the very beginning of the mediation, but she would likely shift her prediction as more information became available. As one experienced mediator noted during an interview regarding a case that had just settled, "If you had asked me at 10 a.m. whether I thought this case was going to settle, I'd have told you there was no way. At 2 p.m., I knew we were there, and by 2:30 we were writing up the agreement."<sup>19</sup> Over the course of a mediation, information can shift in both substance and availability. Only within the fiction of economists' visions of full and complete information would it be sensible to speak of a single prediction

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<sup>16</sup> Zero-sum two-party cases are not the norm in the practice of mediation. Instead, most involve opportunities for value creation or destruction. There may be multiple issues to be resolved, presenting opportunities for value-creating trade. Parties may have differences (in terms of risk, timing, prediction, capacity, etc.) that can be exploited to create value. For a succinct treatment of the possible sources of value-creating opportunities, see MNOOKIN ET AL., *supra* note 7, at 13–29; see also LAX & SEBENIUS, *supra* note 7, at 88–116. There may also be ways in which settlement would create value by preventing future expenditure (e.g., on litigation or further mediation). As a result, a prediction formulation in a non-zero-sum case would depend on a mediator having information about parties' interests, capabilities, resources, preferences, and expectations, along with a sense of how they value various settlement options and how they see their non-settlement alternatives. A mediator might also discount the pessimistic picture described in Figure 2 by attributing it to strategic misrepresentation by the parties. This Article treats the question of parties exaggerating their reservation values in Part V.A.

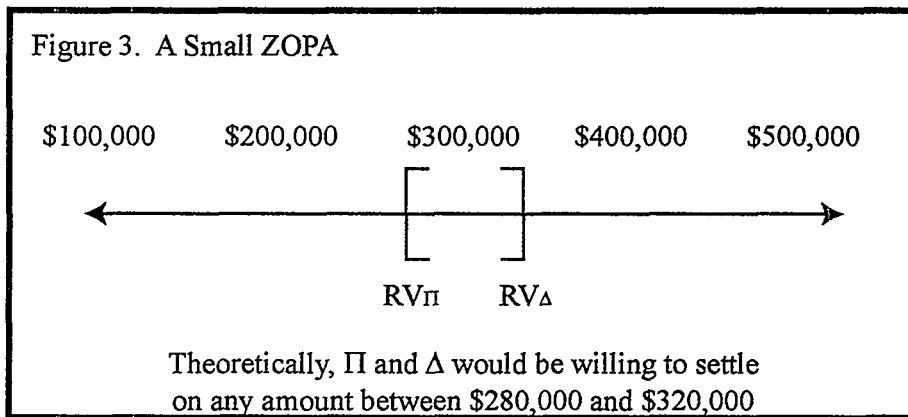
<sup>17</sup> If the parties were negotiating over multiple issues, for example, it might be possible to arrive at an option package that would be satisfactory to both, even if the dollar term alone were not. For purposes of this initial hypothetical, assume that there are no value-creating opportunities between the parties.

<sup>18</sup> Reservation values are a function of parties' interests and their walkaway alternatives. Because of this, reservation values shift during the course of a negotiation if a party learns new information that causes him to reassess his own interests or his walkaway alternative. For purposes of simplicity, in this early section, assume that there is no information that will emerge to cause a change in the parties' reservation values.

<sup>19</sup> Interview with Frank Sander, Associate Dean and Bussey Professor of Law, Harvard Law School, in Cambridge, Mass. (Nov. 17, 1999).

regarding a mediation. Instead, when speaking of prediction, it is important to note that mediators formulate predictions in conditions of incomplete information.

As mediators gain information, they may reasonably alter their predictions about the likelihood of settlement. Returning to the dispute described above,<sup>20</sup> imagine that the parties met privately with the mediator in advance of any direct communication with each other. During that preliminary meeting, each party candidly revealed his reservation value to the mediator. If  $\Pi$  revealed a reservation value of \$280,000 and  $\Delta$  revealed a reservation value of \$320,000, the mediator would recognize the existence of a small ZOPA.<sup>21</sup> See Figure 3.



At this point in time, a mediator might choose to formulate a prediction about the likelihood of settlement. Some mediators in this circumstance might hold an optimistic prediction, relying on the efficiency of the process to lead the parties to an agreement within the existent ZOPA. Others might hold a pessimistic prediction, believing that such a small amount of room in which to bargain will make it unlikely that the parties will arrive at an agreement. In either event, the prediction is based on limited—and therefore imperfect—information. If additional information becomes available, the mediator's prediction would likely shift. Imagine, for example, that following the parties' initial private meeting with the mediator, the mediator and the parties gathered in a joint meeting to hold preliminary talks. During the course of that initial conversation, the mediator had an opportunity to observe some of the interpersonal dynamics

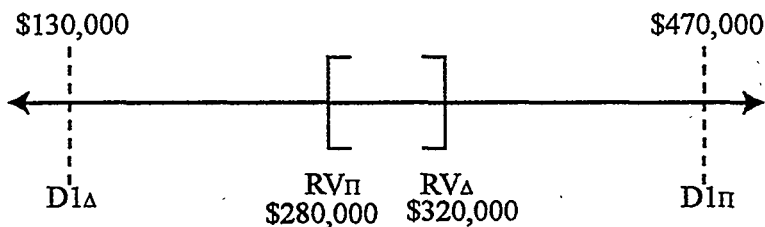
<sup>20</sup>  $\Pi$  and  $\Delta$  are negotiating a settlement payment from  $\Delta$  to  $\Pi$ . The only issue in question is the amount of payment.  $\Pi$ 's only interest is in maximizing the amount of payment, and  $\Delta$  seeks only to minimize his payment to  $\Pi$ .

<sup>21</sup> See *infra* fig. 3.

## AN EXPLORATION OF MEDIATORS' PREDICTIONS

between  $\Pi$  and  $\Delta$ . Furthermore,  $\Pi$  and  $\Delta$  each tabled an initial offer or demand,  $D1_{\Pi}$  and  $D1_{\Delta}$ , respectively. At this point, if the mediator were trying to formulate a prediction about the case, she would have three separate pieces of information. She would still have data about the presence of a small ZOPA. Furthermore, she would have a sense of the interpersonal dynamic between the parties, which she could use to discount or inflate her assessment of the likelihood of settlement. And finally, she and the parties would have the two initial offers.<sup>22</sup> The additional information regarding the parties' initial offers may also have a considerable impact on mediators' predictions. Imagine, for example, the condition created if the gap between  $D1_{\Pi}$  and  $D1_{\Delta}$  were quite large. For example, if  $\Pi$  had demanded a payment of at least \$470,000, and  $\Delta$  had insisted on paying no more than \$130,000, the mediator might assess differently the likelihood of settlement within the ZOPA between \$280,000 and \$320,000. See Figure 4.

Figure 4. Small ZOPA. High Initial Demands.



What are the prospects of settlement?

A mediator in this case might revise her prediction to make it more pessimistic, based on the sizeable gap between the two parties' initial demands.<sup>23</sup>

<sup>22</sup> Only the initial offers would be "common knowledge" in the sense that there is an infinite series of knowledge regarding the offers.  $\Delta$  knows  $D1_{\Delta}$ ;  $\Pi$  knows  $D1_{\Delta}$ ;  $\Delta$  knows that  $\Pi$  knows  $D1_{\Delta}$ ; and so on. Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631, 1631-34 (1997) (defining the concept of "common knowledge" in the context of a mediated, two-party dispute). This is true only for the initial offers because the other pieces of information are either subjective assessments regarding the interpersonal dynamic between the parties or were revealed in confidence only to the mediator (the parties' reservation values).

<sup>23</sup> To some extent, a mediator in a case precisely like this one may augment her assessment of the likelihood of settlement because the option falling directly at the mid-point between the parties' initial demands falls within the narrow ZOPA. Even if there is no objective criteria to support the construction of the initial demands, it is difficult for parties

These demands may merely represent initial bargaining strategy, without significant correlation to the parties' actual valuations in the case. On the other hand, the initial demands may reflect the parties' aspiration levels. Parties with relatively high or over-valued aspiration levels may be less likely to engage in settlement-conducive behavior.<sup>24</sup> Put simply, if  $\Pi$  is hoping to receive \$470,000 (\$190,000 more than her reservation value), it may be difficult for her to arrive at an agreement for only \$300,000 (\$20,000 above her reservation value). The same dynamic would be affecting  $\Delta$  in this case. A mediator formulating a prediction in this case might take the information about the two parties' sizeable initial demands and reduce her prediction about the likelihood of settlement. If, at some later point in the mediation, the parties forward a set of revised demands,  $D_{2\Pi}$  and  $D_{2\Delta}$ , the addition of that information would provide good reason for the mediator to shift her prediction assessment again. Imagine, for example that  $D_{2\Pi}$  and  $D_{2\Delta}$  were \$340,000 and \$260,000 respectively.<sup>25</sup> The mediator's prediction at that point would almost certainly increase in optimism.

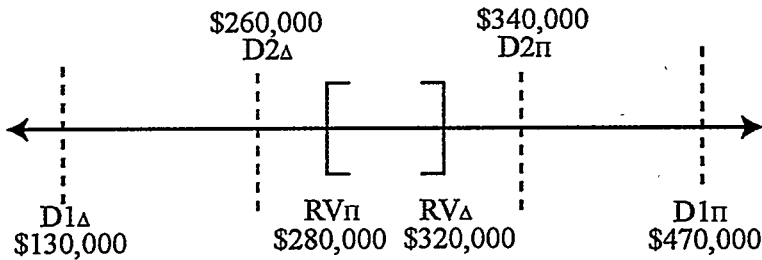
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to avoid anchoring effects. LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 130–31 (1998). It is then common, though not necessarily advisable, for negotiators to focus on mid-point solutions and to view them as fair. *Id.* at 19, 205–208. This section intends primarily to treat the question of cases where the initial demands are far from each other and may suggest the absence of a ZOPA to the parties—regardless of the symmetries in the initial demands with respect to the actual ZOPA.

<sup>24</sup> Aggressive aspiration tends to increase the time required for bargaining and makes impasse more likely. DEAN G. PRUITT ET AL., *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 12–15 (1986) (claiming that impasse is more likely); Aimee Drolet et al., *Thinking of Others: How Perspective Taking Changes Negotiators' Aspirations and Fairness Perceptions as a Function of Negotiator Relationships*, 20 *BASIC AND APPLIED SOC. PSYCHOL.* 23, 24–5 (1998) (stating that settlement discussions take longer); Vandra L. Huber & Margaret A. Neale, *Effects of Self- and Competitor Goals on Performance in an Interdependent Bargaining Task*, *J. OF APPLIED PSYCHOL.* 197, 197–203 (1987) (When both sides have high, difficult to obtain aspiration levels, the likelihood of integrative behavior is reduced). For a very interesting treatment of the effects of negotiator optimism, see generally Hannah C. Riley & Robert J. Robinson, *How High Can You Go?: Investigations of the Perils and Benefits of Negotiator Optimism* (1999) (unpublished manuscript, on file with author).

<sup>25</sup> See *infra* fig. 5.

Figure 5. Small ZOPA. More Modest Follow-Up Demands.



What are the prospects of settlement?

Regardless of the nature of the case in question, it is clear that the key to formulating an accurate prediction is access to information. Mediators in practice will never have access to all of the information that would be relevant to formulating a perfectly accurate prediction.<sup>26</sup> As a result, the best that mediators can hope to do at any stage of a mediation is formulate best-guess estimates about the likelihood of settlement. Nothing is absolutely certain to settle until it has settled.<sup>27</sup> Similarly, there are no disputes that are absolutely certain not to settle.<sup>28</sup> As circumstances become more realistic (more complex and less static), the need for probabilistic predictions becomes even clearer.

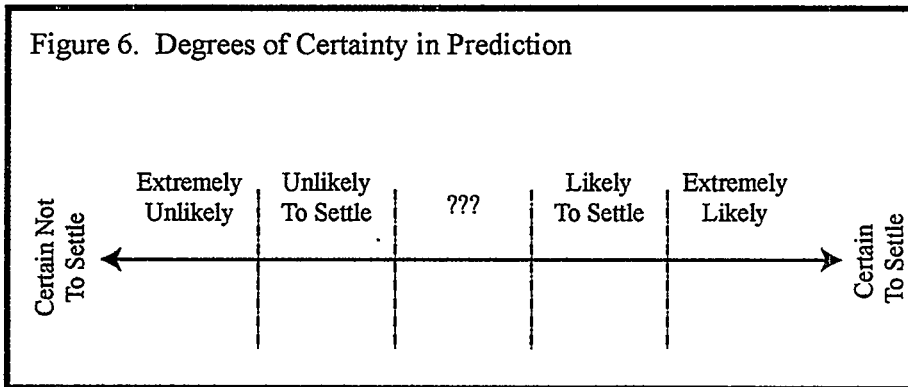
<sup>26</sup> It would be difficult for a mediator to list all of the kinds of information she might want to collect before making her assessment. Sheila Heen has suggested that among the data a mediator might seek would be the following: (1) statements parties made during private caucuses, (2) parties' subjective senses of their BATNAs, (3) parties' skill at understanding the other side, (4) the existence or absence of constituents who may be locking in the negotiators, (5) the emotional content of the case, (6) the state of the relationship, (7) the parties' ability and willingness to listen, (8) the parties' capacity to problem-solve creatively, and (9) the existence or absence of agency issues. Interview with Sheila Heen, Lecturer on Law, Harvard Law School, in Cambridge, Mass. (Apr. 24, 2000). Surely her list is not exhaustive, but it illustrates the enormous complexity surrounding the relevant information.

<sup>27</sup> Yogi Berra once proclaimed, "It ain't over until it's over." PAUL DICKSON, *BASEBALLS' GREATEST QUOTATIONS* 43 (1991). The same ought to be said of mediations. It is unfortunately common for deals to collapse just prior to their completion.

<sup>28</sup> Roger Fisher has noted, for example, that describing the most seemingly unsolvable disputes as "intractable" misses the circularity of the label. In his words, "they're only intractable until someone resolves things." Interview with Roger Fisher, Samuel Williston Professor *emeritus*, Harvard Law School, in Barcelona, Spain (July 20, 1998). Fisher prefers to label such disputes as "protracted," recognizing that there is always some chance that the dispute will not be indefinitely unresolved.

Predictions are not binary (yes—no) judgments. Instead, they tend to be probabilistic assessments of the likelihood that the parties will arrive at a dispositive agreement. For a variety of good reasons, mediators are unlikely to produce even perfectly precise probabilistic assessments of the likelihood of settlement (31% likely or 84% likely).<sup>29</sup> Instead, mediators' predictions are most likely to be characterized with qualifiers that indicate the confidence with which the mediator holds her prediction. A mediator may signal a prediction by saying she is "extremely confident" that the case will settle, or she may say that she "has serious concerns about the likelihood" that it will be resolved.<sup>30</sup>

Figure 6. Degrees of Certainty in Prediction



### B. Prediction Is Not "Evaluation"

There is an important distinction between the commonly discussed practice of mediator "evaluation" and the idea of mediators formulating a prediction. Because both involve an exchange of information from the mediator to the parties, there is some risk that the two will be confused. Analytically, and in practice, the two are distinct.

<sup>29</sup> Note, however, that outside observers may also produce estimates regarding the likelihood of settlement. For example, in discussing the appointment of Judge Posner to mediate the Microsoft antitrust suit in 1999, a Business Week analyst reported that a Brookings Institution outside analyst "put the odds of a mediated settlement at only about 20%." Mike France, *A Microsoft Settlement? Don't Bet On It*, BUSINESS WEEK, Dec. 6, 1999, at 50.

<sup>30</sup> While a mediator may have an understanding of the meaning she attaches to various labels or qualifiers, it is extremely likely that the parties will not attach identical meaning. When a mediator says that settlement is "likely," does that mean she believes it is 51% likely, 60% likely, or 80% likely? There is often a gap between a predictor (whether a mediator or a client's attorney) prose and the percentages the listener attaches to that prose. Jeff Seul, *An Introduction to Litigation Analysis*, Lecture at Harvard Law School (January 6, 2000).

Evaluation within mediation is a practice, adopted by some percentage of mediators, in which the mediator assesses the likely outcome of non-settlement (typically litigation) and communicates her assessment to the parties. The practice has been the subject of a lively exchange among practitioners and scholars alike.<sup>31</sup> This Article does not intend in any way to address the merits or risks of evaluation as a practice.<sup>32</sup> What is important to understand is that the key component of evaluation is that it centers on *the mediator's* assessment of the parties' BATNAs.<sup>33</sup>

Prediction also involves a treatment of parties' BATNAs as one of its components.<sup>34</sup> It is important to note, however, that it is *the parties'* assessment of their BATNAs that is important, not the mediator's assessment. Indeed, it would be entirely possible for a mediator to have absolutely no idea what the non-settlement alternative in a case would be and still to make an accurate prediction about the likelihood of settlement. Similarly, a mediator could disagree entirely with the parties' assessments of their BATNAs and still accurately predict the likelihood of settlement, as long as she had access to the parties' perceptions of their BATNAs. Settlement is not a function of an objective measure of the attractiveness of a BATNA. Rather, it hinges on each party's assessment of the benefits and costs of not settling as compared to his valuation of the best available settlement option or option package.

This Article defines mediator prediction as an assessment of the likelihood of settlement. It is neither a guess at the likely terms of a settlement nor an estimate of the parties' non-settlement alternatives. Instead, prediction is simply a guess as to the probability of the fact of a settlement, regardless of its terms.

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<sup>31</sup> For a useful exploration and critique of several facets of the debate, see Stulberg, *supra* note 9, at 985–1005.

<sup>32</sup> It may be interesting to apply the critiques of evaluative mediator practice to the notion of mediators signaling predictions. However, such an analysis falls outside of the scope of this initial Article.

<sup>33</sup> For a discussion of BATNA, see generally ROGER FISHER WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 104 (Bruce Patton ed., 2d ed. 1991). The term BATNA has gained widespread acceptance and use within the negotiation literature. See, e.g., RAIFFA, *supra* note 5, at 45; MAX BAZERMAN & MARGARET NEALE, *NEGOTIATING RATIONALLY* 67–70 (1992).

<sup>34</sup> Recall that this is only one of the variables considered in the section above. Prediction cannot be made by reference to BATNA assessments alone. In non-zero-sum circumstances, prediction also requires, at a minimum, an understanding of each party's interests and of the range of possible options or option packages. In the real world, prediction would also consider a host of variables linked to the human disputants and their interactions.

### *C. Prediction Signaling*

There is an important distinction between formulating a prediction and sharing that prediction with the disputants. The analysis above considers the question of what a mediator's prediction might be in a given case—a concept this Article refers to as “prediction formulation.” Until this point, the Article has treated prediction as an entirely internal process, as something the mediator figures out for herself. Many mediators engage in some form of inquiry about the likelihood that a particular case will settle, but then keep their conclusions to themselves.

At some point and under some conditions, some mediators may choose to communicate their predictions about a case to the parties. This Article refers to the process of communicating the content of a prediction as “signaling.” “Prediction signaling” can take one of at least three forms—direct intentional, implicit intentional, and implicit unintentional signaling.

Direct intentional signaling is the least subtle, most conspicuous form of signaling. In it, a mediator tells the parties her prediction in a straight-forward manner (*e.g.*, “I’ve been thinking about this case and from what I’ve seen and now understand, I don’t think this is going to settle.; based on what you’ve each told me, I’m confident that you’ll be able to reach an agreement.”). The two important features of this method of signaling are that the mediator intends for the parties to know her prediction and the mediator communicates that prediction directly and unambiguously.

Implicit intentional signaling involves more subtle means of communication, relying on the parties to make meaning out of a mediator's behavior. A mediator might intend to signal something about her prediction through the particular way she frames a discussion, the demeanor she exhibits, the processes she adopts, the scheduling she suggests, and so on. It is easy to imagine that a mediator who believes strongly that settlement is likely (a mediator with an optimistic prediction) would react differently on each of these matters than would a mediator who believed that no settlement would be produced (a mediator with a pessimistic prediction). Obviously, there is a risk inherent in implicit methods of signaling that parties will misinterpret the content of the prediction.<sup>35</sup> Analytically, however, it is important to note that the implicit intentional method of prediction signaling encompasses all of the efforts of a mediator who wants

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<sup>35</sup> If a mediator wants to schedule another meeting right away, then does that suggest that she holds an optimistic prediction or a pessimistic one? Or does it have nothing at all to do with prediction? What if the mediator is particularly encouraging of the parties? What if she suggests bringing principals into the discussions? What if she suggests omitting principals from the discussions? There is considerable risk that parties will watch mediators' actions and interpret the actions in a manner different than the mediator intended.



## AN EXPLORATION OF MEDIATORS' PREDICTIONS

the parties to understand her prediction but does not want to communicate her prediction in a concrete or direct way.

A third and important way in which mediators' predictions are communicated is through implicit, unintentional means. All of the activities and behaviors described in the section above are present whether or not a mediator intends to be communicating anything about a prediction. A mediator will have a demeanor of some sort, will make process decisions, will frame issues, and will interact with the parties even if she does not want the parties to know anything about her prediction in the case. Despite this, there is some risk that parties will be looking for (and finding) signals, whether or not the mediator is intending to send them.

The balance of this Article focuses on direct intentional signaling. While there may be good reason to avoid direct signaling, any implicit method of signaling leaves considerable room for a disconnect between the mediator's prediction signal and the parties' understanding of the mediator's prediction signal.

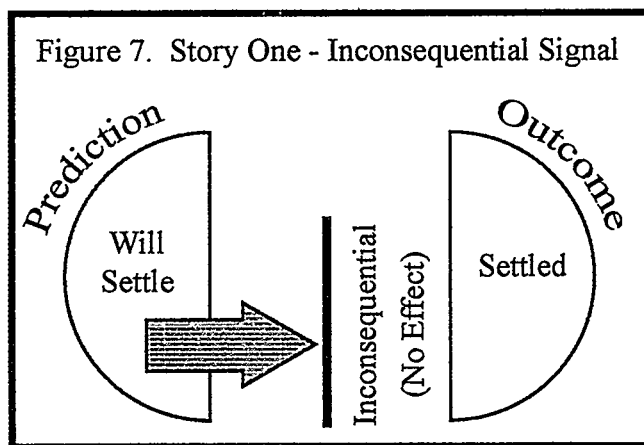
### III. FOUR STORIES OF MEDIATOR PREDICTIONS

#### A. *Accurately Predicting Settlement*

*"The parties were actively engaged, and the dispute lent itself well to creative solutions. I let them know that I thought this case was right for mediation and that we were on track. They easily reached an agreement, with minimal acrimony."*

The first story in this Article is one in which the following occurs: (a) the parties and mediator begin their discussions; (b) at some point, the mediator formulates an optimistic prediction; (c) the mediator signals an optimistic prediction; and (d) eventually, the parties settle. Not all mediations progress this way, but some clearly do. For purposes of this story, assume that it did unfold this way. *Why* would this happen?

There are two fundamental possibilities regarding the combination of an optimistic prediction signal and the fact that the parties reached settlement. In one explanation, the parties largely ignore the optimistic prediction signal—or at least they do not alter their behavior because of it. I refer to this explanation as including an "inconsequential signal." In the other explanation, the optimistic prediction signal creates a change in the way the parties handle the dispute. I label this phenomenon the "influential signal."

1. *Inconsequential Signal*

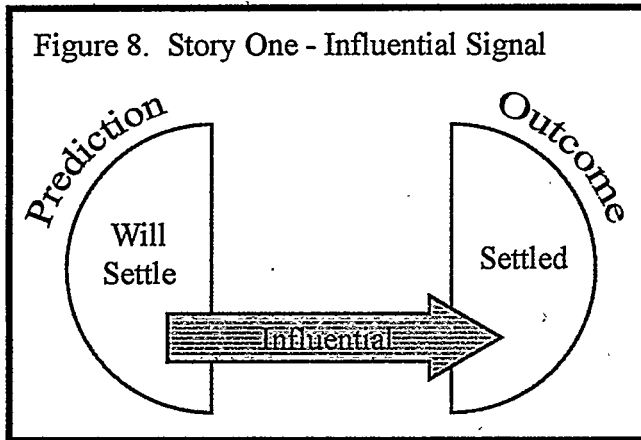
Some prediction signals are inconsequential, meaning they do not alter the way in which the mediation or negotiation in question unfolds. It would be as if the mediator never signaled her prediction or signaled it in such a way that the parties knew nothing about it. By analogy, if I pick up the phone and place a (legal) wager on the next game, betting that the home team will win, I am signaling my prediction about the outcome. It is extremely unlikely, however, that the fact of my prediction will alter the way the home team plays the upcoming game. My wager or prediction will have been inconsequential.

In this case, the mediator's optimistic prediction signal may have been inconsequential. For example, in some cases, it is patently obvious to all involved that a settlement is forthcoming or even imminent. To have someone name that fact out loud may do nothing to change the march toward settlement. To some extent, parties may experience such a prediction as helpful and encouraging because it reinforces previously held beliefs. Alternatively, parties may find it annoying or irrelevant to have someone name what is already obvious.<sup>36</sup> In either event, an optimistic prediction signal in a case that settles may have been causally unrelated to the fact of settlement.

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<sup>36</sup> For example, building jigsaw puzzles was a part of my family's holiday tradition. One year, my cousins and I worked for days on a particularly large puzzle. When we were within a dozen or so pieces of finishing this jigsaw puzzle, my uncle walked by and observed our progress. At that point, he said, "I think you guys should be able to finish up this puzzle sometime soon." Our reactions to his declaration ranged from amusement to indifference to mild annoyance, but it did not affect the way in which we went about completing the puzzle.

## 2. Influential Signal



Some prediction signals are “influential” in that they have an effect on the way the parties behave in the mediation and, therefore, affect the outcome of the mediation.<sup>37</sup> The parties may credit the impressions of the mediator because they stem from one who is well-informed about the circumstances and is fairly unbiased. It would be reasonable for the parties to change their behavior based on a declaration from such a well-respected source. By analogy, if I am the coach of a little league team and I tell my team that I think they are going to win the game, my comment could have an effect on the way they play the game. For example, they may believe me and my prediction, and become more relaxed or more confident. In that sense, my optimistic prediction signal may have influenced the outcome about which I was predicting.

In this case, it is possible that the mediator’s optimistic prediction signal had an influence on the way the parties behaved, making it more likely that the case would settle (and that the prediction would come true). There are at least four ways in which these effects might be explained.

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<sup>37</sup> Predictive statements may also have an effect on the behavior of the mediator. If a mediator makes a public statement about the likelihood of settlement, her statement may affect her decision-making, if not her perceptions. With an optimistic prediction signal, in particular, a mediator might feel pressure to then see that the parties arrive at a settlement *because* she had already indicated that she believed a settlement was forthcoming. For purposes of this analysis, I ignore this possibility, using the assumption that a mediator will always engage in her best efforts to serve the disputing parties in an appropriate way. I acknowledge, however, that mediators’ prediction signals may create additional (pre-commitment) incentives for mediators.

First, an optimistic prediction signal may create a pro-settlement influence merely because it induces the parties to stay engaged in the mediation. If a party is considering withdrawal from a mediation, it would likely be because he saw no value in continuing, no prospect for settlement. An optimistic prediction signal from the mediator suggests that a ZOPA exists and that settlement should occur. Assuming that the transaction costs of involvement are not excessively high, a party who receives a credible optimistic prediction would have little incentive to withdraw. An optimistic prediction signal, therefore, may make settlement more likely because it can keep parties "at the table," and engaged in the mediation.<sup>38</sup>

Second, an optimistic prediction may serve as a settlement-inducing influence because it may be received by the parties as a "celebration" of their capacities or efforts. Some scholars have noted that groups or individuals may perform better at a particular task if they are told that they are good at doing that task. This process of indicating to individuals or groups that they are skilled at a particular task is referred to as celebration.<sup>39</sup> To some extent, an optimistic prediction signal may serve as a celebration of the parties' capacities and their problem-solving skills, thereby making it more likely that they will arrive at a settlement.

A third potential source of influence related to an optimistic prediction signal is the chance that it will create an incentive for the parties to "please" the mediator—or at least not to disappoint her. Some parties may defer to the mediator's assessment of what is possible and may even feel a heightened sense of urgency about achieving that outcome. This impact would clearly not be experienced by all parties, but there is at least a chance that some parties will perceive the mediator with such a degree of esteem or deference that they would alter their behavior in order to "live up to" the standard articulated by the mediator.

Finally, an optimistic prediction signal may alter the parties' behavior in a dispute by legitimizing the actions the parties have taken up to the point of the

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<sup>38</sup> Lee Ross recently recounted a experiment that he conducted involving several different groups, each engaging in the same difficult task (predicting the next U.S. President). Initially, only a few of the groups successfully completed the assigned task. However, after Ross offered encouragement to the groups—telling them that past groups had been able to successfully complete the task—a significant percentage of the groups returned to the task and completed it successfully. Lee Ross, Presentation at The Lawyer As Problem-Solver Workshop (Apr. 8, 2000). To some extent, there may be parallels between these effects and those observed when judges issue "dynamite charges" to juries that are deadlocked.

<sup>39</sup> Bruce M. Patton, Address at the Training for Trainers Seminar, Harvard Law School (June 14, 1992); *see also* Richard H. Lee, The Couple's Therapist as Coaching Double in a Model Encounter (May 29, 1992), at <http://people.ne.mediaone.net/ricklee/lee92.html>.

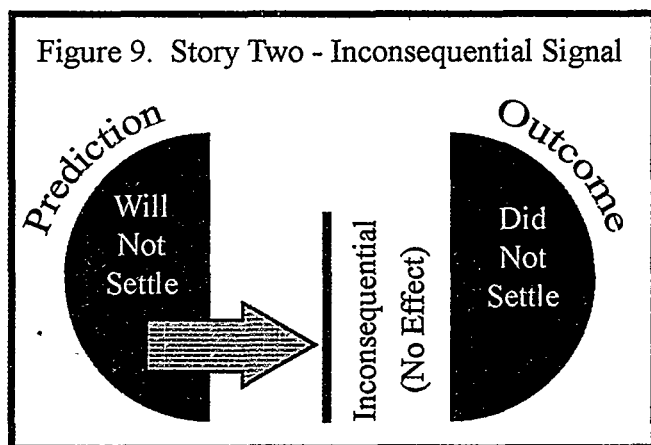
prediction. An optimistic prediction is a projection into the future. The parties have not already arrived at a settlement—the mediator is merely predicting that they will. One part of the data a mediator relies on to make her prediction is the behavior of the parties up to that point. If the parties are engaging in destructive patterns of behavior, a mediator would be unlikely to hold an optimistic prediction because it is virtually impossible to hold an optimistic prediction if the parties' behavior is viewed as insurmountably destructive. Indeed, it is possible that the parties will receive a mediator's optimistic prediction as an indication that their behaviors are appropriate and consistent with settlement. In that sense, an optimistic prediction may make settlement more likely because it implicitly highlights and encourages pro-settlement behaviors from the parties.

It is difficult to predict the impacts of signaling an optimistic prediction. An optimistic prediction signal may have a self-fulfilling effect. That is, it may be influential, causing the parties to adopt behaviors conducive to settlement. At the same time, it may have no impact on the parties whatsoever. This section does not intend to predict or even define the full range of possible impacts of signaling an optimistic prediction. Instead, it merely suggests that there may be at least two explanations (the inconsequential and the influential) for a case like the first story, in which a mediator signals an optimistic prediction and a settlement follows.

### *B. Accurately Predicting Non-Settlement*

*"I could tell early on that this wasn't going anywhere. The parties seemed incapable of working together, and the nature of the dispute in question made it difficult to find any common ground. I told them I wasn't optimistic, and eventually we called off the mediation."*

The second story of mediator prediction and its impact is one in which (a) the parties and mediator begin their discussions; (b) at some point, the mediator formulates a Pessimistic prediction; (c) the mediator signals a Pessimistic prediction; and (d) eventually, the participants call off the mediation without settlement. As with the first story, there are two possible explanations regarding the combination of a pessimistic prediction and a non-settlement. The signal may be inconsequential or influential.

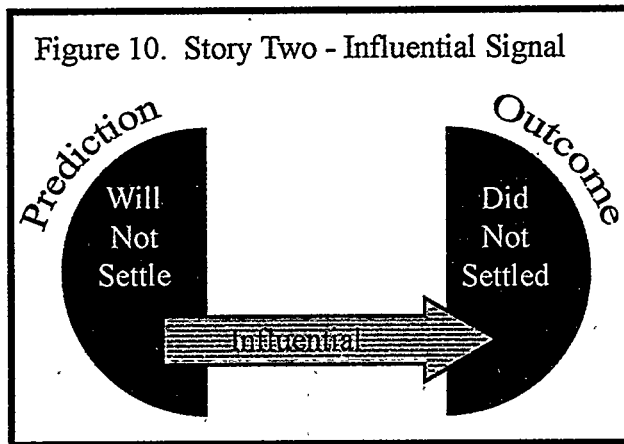
1. *Inconsequential Signal*

A pessimistic prediction signal may have no bearing on the fact that the parties reached no settlement. As with the Las Vegas visitor placing a wager on the outcome of an activity which is unaffected by the content of the wager,<sup>40</sup> a mediator's pessimistic prediction signal may have had no impact on the fact that the case did not settle. For example, imagine that a mediator learns that the parties' preferences and BATNAs produce a dynamic in which there is no ZOPA. Such a condition was described above in Figure 2. In such a case, the parties were destined not to settle, and they would have reached non-settlement whether or not the mediator signaled her own pessimism about the case. The same might flow from a situation in which the mediator assesses the parties' behavior to be so inalterably destructive that no settlement would be created, even if economically rational actors might prefer to settle. Some cases are so plainly destined not to settle that the insertion of a mediator's pessimistic prediction has no impact on the parties' behavior or on the outcome of the mediation.

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<sup>40</sup> This assumes, of course, that the gaming facility in question has not "fixed" the otherwise uncertain event or equipment in some way that would cause it to deviate from a purely random outcome.

## 2. Influential Signal



As with the optimistic prediction signal described in the first story, it is possible that the mediator's pessimistic prediction signal in this story had an influence over the parties' behavior in a way that made settlement less likely. The most obvious aspect of the settlement dynamic which may be impacted by a pessimistic prediction signal is the parties' willingness to stay actively engaged in the mediation process. No mediator can create a settlement without the consent of the parties. If the parties choose to disengage from the mediation process, it ends without settlement.

Why might parties withdraw from a mediation if a mediator signals a Pessimistic prediction? One reason is that mediations involve transaction costs. Mediators' fees, the lawyers' fee structures, and the opportunity costs of the principals all attach costs to each extra hour or day of the mediation. If a party saw no return from that investment, he would reasonably disengage from the process and walk to whatever alternative he has to mediation. A second possibility stems from the psychological and relationship costs of being involved in a protracted mediation or negotiation. In some contexts, parties may consider the process of being involved in a dispute so unfavorably that they would prefer an alternate means of resolving the issue—even if it yields a less attractive substantive payoff.<sup>41</sup> A final possible explanation for parties disengaging from a mediation following a pessimistic prediction signal is that the parties may believe that they would not be well-served by a mediator who views the endeavor

<sup>41</sup> Examples could include things like divorce, where the parties may find it so hard to deal with each other that they would prefer to "just get it done." Another example could be one in which there is an ongoing relationship—one that holds a perception that disputing would hurt the value of the relationship beyond the value of the dispute itself.

at hand as unlikely to be successfully completed. The parties may believe that the mediator suffers from judgment bias of some sort about the likelihood of settlement, and the parties would rather walk away than choose to deal with that bias.<sup>42</sup> In any event, a party who receives a pessimistic prediction signal might reasonably opt to withdraw from a mediation in which he would otherwise have stayed involved.<sup>43</sup>

While many mediators may view non-settlement of a mediation as a “failure,” predicting and inducing the cessation of negotiations can create value for the parties involved. In some contexts, a valuable function a mediator can play may be to act as a screening agent for the parties, assessing the appropriateness of mediation to the particulars of the dispute. If a pessimistic prediction signal exerts influence over the parties’ behavior, causing them to cease the mediation more quickly than they might otherwise have done, the mediator’s actions may be largely value-creating. This assumes, of course, that the influential signal merely acted to hasten an inevitable non-settlement outcome. It would be an entirely different outcome if the mediator’s influential pessimistic prediction signal acted to cause non-settlement in a case that otherwise would have settled. Furthermore, this assumes that the parties would not benefit from engaging in mediation even in the absence of settlement. Many mediation scholars have suggested that through mediation, parties are better able to narrow the dispute in question, improve communication, and potentially protect ongoing relationships—even if the mediation does not produce a settlement on all of the relevant issues in dispute.<sup>44</sup>

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<sup>42</sup> It may be that the parties would prefer to engage the services of a mediator who believes (even naïvely) that the mediation process is likely to be of benefit to the parties.

<sup>43</sup> If a signal is influential (rather than inconsequential), a mediator’s signal may raise ethical issues. influential signals are unlike the Las Vegas bet that has no effect on the performance of those on whom the wager is placed (the inconsequential signal). This Article treats some of these ethical concerns in a later section. For now, consider the degree to which an influential pessimistic prediction signal would be like a manager or coach betting against her own team.

<sup>44</sup> ROGER & SALEM, *A STUDENT’S GUIDE TO MEDIATION AND THE LAW* (1987) *quoted in* GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 104–131 (2d ed. 1991) (‘When the parties fail to agree on all issues, the mediator may try to salvage the positive results of mediation. The parties may be able to stipulate certain facts, cooperate in discovery or agree to another way to resolve the dispute. They may have learned to negotiate better and may, in fact, settle unresolved issues themselves later.’)

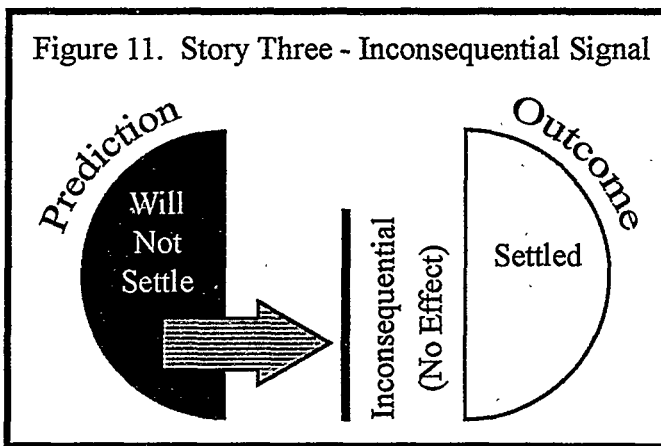


### C. Predicting Non-Settlement in a Case That Settles

*"We had been working at this case for a long time, and I didn't see any progress at all. The parties were still stuck in their original positions, and I told them I saw little hope of arriving at a settlement. To my amazement, they almost immediately began to cooperate with each other, and we ultimately reached an agreement."*

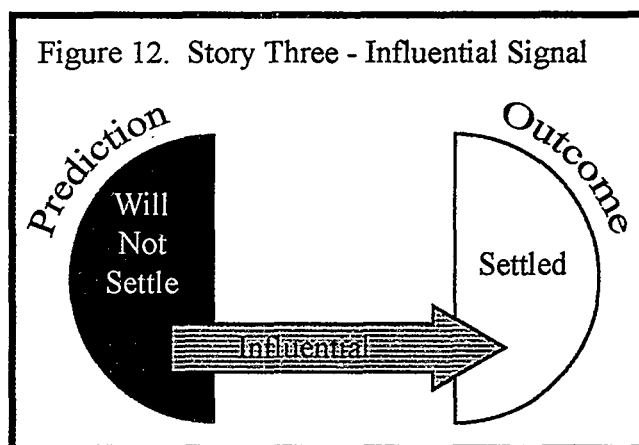
The third story of mediator prediction is one in which the mediator formulates a pessimistic prediction and signals it, but the parties ultimately settle the dispute. In short, the mediator's prediction is wrong, or becomes wrong because the parties change their behavior.

#### 1. Inconsequential Signal



One reasonable explanation for the disconnect between the predicted outcome and the actual outcome is that the mediator could simply have been mistaken in her assessment. As noted above, prediction can be a tremendously tricky endeavor, and no mediator would ever have access to all of the information she might desire. If the parties in the dispute did not make the same miscalculation as the mediator, then they might reasonably opt to ignore the pessimistic prediction signal as inconsistent with their own perception. Particularly in complex cases, where parties have reason to distrust the accuracy or completeness of the mediator's information, it may be reasonable for the parties to proceed without regard to the mediator's prediction.

## 2. Influential Signal



It is also possible that by sending a pessimistic prediction signal, the mediator may actually induce behavior that makes her own prediction unlikely. That is, by telling the parties that she does not think they will settle, the mediator may be making it more likely that they will. This may happen for a number of reasons.

One possible explanation for this result is that the parties may experience the mediator's pessimistic prediction as a challenge against the parties' capacities in some way. In brief, some groups (even those who previously viewed themselves as in conflict with each other) may rise to the occasion if they are told that they do not appear capable of performing a particular task.<sup>45</sup> While some parties may experience a pessimistic prediction as conclusive evidence that they cannot resolve the issue at hand, others may be motivated by the mediator's prediction to "prove" their own capabilities by disproving the mediator's stated hypothesis about the parties' inability to settle.

Another possible explanation for why a pessimistic prediction signal might induce a settlement-conducive change in the parties' behavior is the way in which it may change parties' perceptions of their role relative to the mediator. In some circumstances, parties appear to abdicate all responsibility they may have for arriving at a settlement, perceiving such activity as "the mediator's job." Essentially, they engage purely in value-claiming ways, believing that the

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<sup>45</sup> Bruce Patton introduced me to the idea of "challenges" to groups in June of 1992. In a classic formulation, the "challenge" method he suggests takes the form of "I wonder if we are simply incapable of doing X." The observed response is often that groups will be so uncomfortable with the idea that they are "incapable" of a particular thing that they will change their behaviors in order to achieve X. Patton, *supra* note 36.

## AN EXPLORATION OF MEDIATORS' PREDICTIONS

mediator will figure out a way to create a settlement. If a mediator signals that she believes that no settlement can be found, it is possible that parties will believe that they will need to take some responsibility for fixing this mess themselves (since the mediator seems incapable of doing it herself).<sup>46</sup>

Finally, it is possible that parties will hear a mediator's pessimistic prediction signal as a sign that the ZOPA is small enough that continued value-claiming tactics will not produce a settlement. In essence, the parties may hear the mediator telling the parties, "You have grabbed more than enough—in fact, you've grabbed too much." If the parties find the mediator's prediction credible, they may judge that it is in their interest to change behaviors in a way that makes settlement more likely.

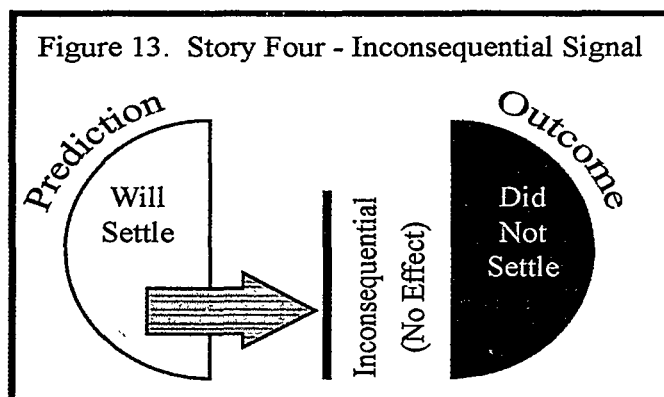
### *D. Predicting Settlement in a Case That Does Not Settle*

*"Everything seemed like it would work. The parties were making good progress, and they seemed like they understood the need for further compromise. I commented that I thought things were right on track for a settlement, and suddenly, everything collapsed. We never did get the talks back on track, and they never did settle."*

The fourth and final story involves a case in which the mediator arrives at the conclusion that a case is destined to settle and indicates that conclusion to the parties. In the end, however, the case does not reach a settlement. The mediator's prediction turns out to have been incorrect or to have caused a change in behavior she did not anticipate.

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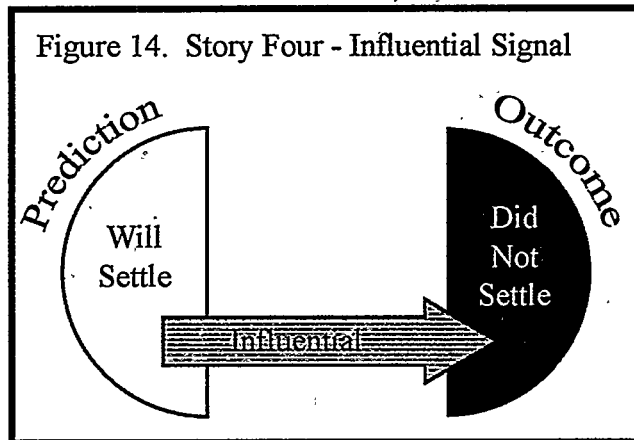
<sup>46</sup> A variant on this approach sometimes results from intentional actions by mediators who portray themselves as "dumb mediators" for purposes of causing the disputants to believe that they must work harder collectively to overcome the ignorance of the mediator.

1. *Inconsequential Signal*

As always, one possibility for explaining this combination of circumstances stems from mediator error. She may have misunderstood the parties' interests or reservation values in a critical way. She may have overestimated the amount of value the parties could collectively generate, or the difficulties that would be posed by its division. She may have failed to appreciate important non-economic or even non-rational influences that served as barriers to resolution. For one reason or another, the mediator may have missed the signs that this case was *not* destined to settle.

If the case was not destined to settle, regardless of the efforts of the mediator, her optimistic prediction signal would have no effect. When acting outside the realm of theory, where purely rational actors and full information are assumed, a mediator may develop a belief that a case will settle, despite the apparent lack of a ZOPA. She may be focusing on the possibility of joint gains, on the communication or relationship between the parties, or on the likelihood that subsequent developments or information would arise to cause a change in the parties' behaviors. Sometimes, her assessment of the likelihood of settlement will be correct, and a ZOPA will emerge. In other cases, she may formulate and signal an optimistic prediction in a case that, in fact, will not settle under any circumstances. Such a signal may lead to surprise or even interest in the parties. It would not, however, cause them to settle for an amount inferior to their reservation values. In such cases, no settlement would accrue—whether the mediator signaled an optimistic prediction or not.

## 2. Influential Signal



Parties may not always ignore a mediator's optimistic signal. It is possible that parties will make meaning of the optimistic signal and change their behavior based on that meaning. One potential outcome from that change in behavior is that parties will act in ways consistent with settlement as a result of the mediator's signal.<sup>47</sup> An alternative story is one in which the parties change their behaviors *away* from those conducive to settlement. This is the influential component of Story Four.

Many mediators signal optimistic predictions with great frequency.<sup>48</sup> It is not uncommon to hear mediators "encouraging" parties by citing the progress they have made and pointing to the prospect of settlement. Indeed, the optimism expressed exceeds the optimism apparently merited in many cases. This overly optimistic tendency may be inconsequential, and therefore without significant benefit or cost.

If, on the other hand, the behavior is influential, then heightened optimism (coupled with signaling) may have potential benefits or costs. The potential benefits of expressing optimism, even in a case that appears not to merit such optimism, are illustrated with the influential branch of Story One—the one in which a mediator's optimistic prediction helped to bring about the settlement itself. The potential costs associated with the expression of unwarranted optimism appear in this section, the influential branch of Story Four.

<sup>47</sup> See *supra* Part III.A.2.

<sup>48</sup> My observation, and the observation of several of the other experienced mediators I interviewed, is that this tendency is wide-spread and depends only slightly on the context in which the mediations take place.

One of the keys to guessing the impacts of an influential prediction signal must hinge around the message the parties hear in the signal. For example, in Story One, the parties may be motivated to *continue* a particular set of behavior if they hear the prediction signal to mean, "Keep on doing what you've been doing." This is consistent with the intention of the mediator in sharing her optimistic prediction—to cause the continuation of the dynamic she has judged to be conducive to settlement. In Story Four, it is possible that the parties may construe a different meaning of an optimistic prediction signal.

One message a party might reasonably hear a mediator sending with her optimistic prediction is, "You have sacrificed enough." Particularly in cases that have significant and easily quantified distributive issues, it is common for parties to have partisan perceptions about how much they have contributed or sacrificed as compared with the other side. In this context, each part believes that he has sacrificed more and that the remaining burden should be shouldered by the other side.<sup>49</sup> Thus, a mediator's optimistic prediction signal might be interpreted as an invitation to "sit back." If both parties interpret the optimistic signal this way, and they are not already at a point within the ZOPA, they may both change their behavior in ways that make settlement less likely. In the words of one international negotiation practitioner, the parties' "manage to snatch defeat from the jaws of victory"<sup>50</sup> by believing that they have no further responsibility to see the negotiations conclude.

A second message a party might receive from a mediator's optimistic prediction signal is, "The ZOPA here is large. You can claim more." Uncertain whether there is a ZOPA at all, parties might reasonably decide to begin negotiations with a conciliatory, pro-settlement approach. Particularly in contexts where each perceives his BATNA to be very unattractive, the parties may see the risks of early "value-claiming" tactics as too significant. On the other hand, if such parties then received a signal from the mediator that she was confident that a settlement would be found, each party might perceive the signal almost as an invitation to *claim* more, rather than as a statement of the need to continue his earlier productive behavior. As one economist and negotiation scholar put it, "I'd think I didn't grab enough if you told me you thought we were going to settle."<sup>51</sup>

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<sup>49</sup> THOMPSON, *supra* note 23, at 32–35; Linda Babcock, *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); David M. Messick & Keith Sentis, *Fairness, Preference, and Fairness Biases*, in EQUITY THEORY: PSYCHOLOGICAL AND SOCIOLOGICAL PERSPECTIVES 61, 61–94 (David M. Messick & Karen S. Cook eds., 1983).

<sup>50</sup> Interview with Joe Stanford, Senior Consultant, Conflict Management Group, in Port-au-Prince, Haiti (Oct. 21, 1998).

<sup>51</sup> Interview with David Metcalfe, CEO, vitivio.com, in Cambridge, Mass., (Dec. 3, 1999).

## AN EXPLORATION OF MEDIATORS' PREDICTIONS

Parties may change their behavior in ways that make settlement *less* likely if they receive an Optimistic prediction signal. They may become more passive, each waiting for the other side, or perhaps the mediator, to finish the job. They may even decide to adopt a wholly different set of behaviors, engaging in claiming tactics in ways they had not previously.

### IV. A DIRTY LITTLE SECRET? UNTRUTHFUL PREDICTION SIGNALS

In each of the four stories above, the mediator is described as developing her prediction based on her observations and signaling that prediction to the parties. An assumption underlying each of these four stories is that the prediction the mediator formulates matches the prediction she signals. In other words, each of these stories assumes that the mediator does not misrepresent her prediction to the parties. It seems unlikely that this assumption is universally appropriate in the world of practice.

Why would a mediator misrepresent her prediction in signaling it to the parties? Listed below are four possible motivations for a mediator to intentionally send a prediction signal which is opposite of the one she actually holds.<sup>52</sup> The first three explanations are not particularly charitable to mediators, and they likely account for, at most, a small fraction of the cases in which mediators signal predictions they do not believe. The final explanation, however, illustrates an important point about the dynamic nature of prediction signaling and mediation outcomes.

#### *A. Sending False Signals to Avoid Discomfort*

The first uncharitable explanation for willful misrepresentation by the mediator could be a simple aversion to delivering unwelcome news. If a mediator believes that a case is unlikely to settle and knows that both parties dislike their non-settlement alternatives, she may be hesitant to deliver her pessimistic prediction accurately. A mediator might do this if she believed that the signal would be inconsequential. "As long as the signal is inconsequential," she might reason, "the parties are no worse off for my having signaled an optimistic prediction. They still would have failed to settle, and I would not have to go

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<sup>52</sup> There are a great number of reasons why a mediator's prediction may be wrong. Her information may be incomplete; the parties may change behaviors; external factors may arise; or her analysis may be imperfect. Mediators are only human, after all, and it is not surprising to think that their predictions may sometimes be wrong. On the other hand, this section explores the possibility that a mediator's prediction signal may be inaccurate or false. If, for example, a mediator formulates and holds an Optimistic prediction but signals a Pessimistic prediction, her prediction signal is inaccurate.

through the unpleasant experience of telling them I thought they wouldn't settle."

This explanation runs counter to most visions of professionalism. Without entering the debate over whether mediation qualifies as a profession, most would agree that it would be inappropriate for a mediator, or anyone hired to perform a service, to sacrifice her clients' interests in having full information, in favor of her own interest in relative social comfort. Building inspectors, doctors, lawyers, and management consultants regularly encounter information they know their clients would consider "bad news." Even if the delivery of that news may be inconsequential, it would be difficult to defend a decision to deliver the *opposite* news to the client.

### *B. Sending False Signals for Personal Gain*

A second, even more unflattering explanation for a misrepresentation by a mediator, would be one in which the mediator would stand to gain from the continuation or cessation of the mediation. Imagine a case in which a mediator charged the parties a daily rate and quickly came to the conclusion that the case was destined not to settle. By sending an optimistic prediction signal, the mediator could seek to extend the mediation (and her paychecks). If the parties are influenced by the signal, they would remain engaged in an effort the mediator believed was doomed to fail. Similarly, it is not impossible to imagine a scenario in which a mediator would stand to gain if a mediation session ended quickly, even if there were no settlement. For example, a mediator might be engaged by two relatively small corporations locked in a bitter, but low-stakes contract dispute. Imagine that this mediator received an offer to mediate a far larger, more lucrative mediation elsewhere on condition that she begin tomorrow. The mediator in that case might have an incentive to signal a pessimistic prediction to the parties, in the hopes that it would be influential, quickly creating an outcome like the one in Story Two.

It is important to note at this point that both of these explanations may accurately capture the practices of some mediators, but they are not intended to be prescriptive or suggestive of good practices. Both contain serious breaches of a mediator's ethical responsibilities to her parties and clients. It is not within the scope of this Article to consider the full range of ethical implications associated with prediction or prediction signaling. Surely, though, there would be few who would suggest that it is appropriate for a mediator to make misrepresentations to the parties in order to advance her own personal interests at the expense of the parties' interests.



### C. Sending False Signals "Because It's My Job to Be Optimistic"

A third possible explanation for a mediator's decision to misrepresent her prediction signal to the parties deals specifically with falsely optimistic predictions. Some mediators appear to signal forms of optimistic predictions in virtually every case they mediate.<sup>53</sup> The statistics on settlement rates in mediations vary considerably, and in many cases they are quite high.<sup>54</sup> Still, the percentages would suggest that at least *sometimes* every mediator will be faced with a case that is destined not to settle. Indeed, a mediator who settles 100% of her cases merits considerable scrutiny for evidence of coercion or other inappropriate behavior. Some cases should not settle, and many will not settle. Given this, the fact that some mediators seem to send optimistic prediction signals in every case suggests that the signals themselves may not be genuine reflections of the mediator's assessment of the likelihood of settlement.<sup>55</sup>

The mediators in these cases may have a narrow assumption about the appropriate role(s) of mediators. Among the roles that they consider appropriate is that of "cheerleader"—the person encouraging the parties along, often by signaling optimistic predictions. This could be because they are trained to do so—sending optimistic signals regardless of the context. They may also do so because optimistic prediction signals appear to be more consistent with the cheerleader function than a pessimistic prediction signal would be. Imagine the cheerleading squad on the side of the field chanting, "We don't think you're going to win, but go team anyway!" That hardly rolls off the tongue like, "We're number one! Go

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<sup>53</sup> These statements may be as straight-forward as saying, "I think we'll be able to find a settlement you'll both like." Alternatively, they may be less directly predictive. Many mediators, for example, frequently declare to the parties that "We've made great progress so far," even in cases where such progress is not immediately apparent. Furthermore, they appear to allow the perception that this progress is significant enough to warrant optimism.

<sup>54</sup> See Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 394, 397 (Kenneth Kressel et al. eds., 1989) (claiming that a median rate of settlement can be estimated to be around 60%); Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *NEGOTIATION J.* 259, 259 (1996) (showing a study of four major service providers had settlement rates of around 78%).

<sup>55</sup> It is possible that a mediator might be stricken with such an overpowering case of optimistic overconfidence in her own abilities that she would be unable to conduct a reasonable assessment of the likelihood of settlement. That is, a mediator might believe in her own abilities so strongly that she would never meet a case she did not believe she could settle. Such a condition strikes me as dangerous in several ways. Importantly, though, such cases do not fall within this analysis because those particular mediators, in fact, *believe* their optimistic prediction signal, even though most outside observers would not. This section focuses on those who *do not believe* the signal they are sending.

team!” In essence, a mediator may misrepresent a pessimistic prediction signal because it feels wrong to signal something inconsistent with settlement.

This rationale for misrepresenting a prediction signal may be descriptively accurate, but it is not easily defensible. It relies on an assumption about the role of the mediator that is unjustified by the increasingly sophisticated market for mediation services. Parties may hire a mediator for any number of reasons—for their assistance in facilitating communication, for their creativity, for their expertise in a subject matter, for their skill in coordinating complex processes, for their ability to attract resources or attention to the dispute, and for a number of other reasons. Parties may also hire a mediator purely for her ability to play a cheerleading function. Absent specific evidence that this is the case, however, it is inappropriate for a mediator to assume that this is the only, or even the most important, function she can provide to the parties or that this function should trump other possible functions potentially impacted by candid disclosure.

#### *D. Sending False Signals Hoping They Will Be Influential*

The most likely, and most charitable, reason for a mediator to misrepresent a prediction is that she may believe that the prediction signal would be influential, leading to settlement. Assume that the mediator believes that the parties would like to arrive at a settlement and that it is her job to do what she can in order to help them do so. If a mediator in that case held a pessimistic prediction, she might opt to send an Optimistic prediction signal, in the hopes that it would be influential and lead to an outcome like that described in Story One. The optimistic prediction signal might become a self-fulfilling prophesy, creating the outcome the parties desired. Similarly, imagine a case in which a mediator formulated an optimistic prediction. She might signal that prediction, in the hopes that Story One would result. She may also have reason to fear that the parties would react badly to receiving an optimistic prediction signal. In that case, she might choose to signal a pessimistic prediction, in the hopes that it would spur action in the parties, leading to settlement as in Story Three. The misrepresentations in these cases are motivated by an assumption that settlement is the desired outcome and by an assumption that the mediator’s prediction signal will be influential.

#### *E. The Implications of False Signaling*

The practice of signaling a prediction one does not actually hold raises very serious ethical questions for practicing mediators. The question of mediators’ duties to the parties is not one on which there is consensus within the mediation

community.<sup>56</sup> It is also not within the scope of this Article to consider fully the ethical ramifications of mediator misrepresentations. Still, it is important for practitioners to note that the end of settlement may not serve as an adequate justification for the misrepresentations described in the sections above.

At a more practical level, it is important to note that if it is possible that a mediator may misrepresent her prediction signal to the parties, then it is appropriate to assume that the parties recognize this possibility as well. Parties will always have to assess the likelihood that a mediator's prediction is inaccurate because of incomplete information. With the introduction of the possibility of misrepresentation, parties must also assess the likelihood that the mediator's prediction signal is genuine before determining whether to allow the prediction to affect their behavior in any way. The result of this possibility is that it appears less likely that a mediator's prediction signal will be influential, because parties may have discounted its accuracy.

### V. IN PRACTICE

The primary focus of this Article has been to introduce the concept of mediator prediction. Mediators often engage in prediction formulation, and many engage in signaling. It seems, however, that this practice has been largely unconscious, or at least without any particular organizing theoretical foundation.

The impacts of prediction signaling are difficult to foresee, at best. The sections above suggest several reasons for this difficulty, and there are likely many other factors that contribute to make any exploration of mediation prediction dynamics a difficult one to understand fully. Without ignoring those difficulties, there are many avenues of inquiry, not yet explored, that may shed light on the practice of mediator prediction formulation and signaling.<sup>57</sup>

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<sup>56</sup> The various draft versions of the Uniform Mediation Act provide some illustration of the debate over mediators' duties and potential liability or immunity. *See generally* Bridget Genteman Hoy, Comment, *The Draft Uniform Mediation Act In Context: Can It Clear Up The Clutter?*, 44 ST. LOUIS U. L.J. 1121 (2000). For more on immunity, *see generally* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47 (1986); Arthur Chaykin, *Mediator Liability: A New Role for Fiduciary Duties*, 53 U. CIN. L. REV. 731 (1984).

<sup>57</sup> Specifically, I believe that there are at least three different potentially useful lines of inquiry regarding mediator predictions. First, there are important descriptive questions about what mediators' actual practices are in formulating and signaling prediction. Second, there are some interesting analytic questions regarding the incentive structures created by the addition of this information into disputants' calculations in various conditions. Finally, there are several fundamental ethical questions about mediation and the role of the mediator illustrated by the concept of prediction, although certainly not limited to prediction.

Nevertheless, mediators who formulate and signal predictions can provide appropriate and helpful services to their clients in the context of a mediation. Prediction formulation is not the sole function of a mediator, nor should mediators signal all of their predictions all of the time. Instead, mediators should consider the potential merits of prediction formulation and signaling in particular contexts and in particular ways. The sections below are designed to highlight some of the considerations and practices mediators might adopt in their treatment of predictions.

### *A. Dampened Certainty*

A mediator's information is virtually never complete. She may have confidence that she has gathered most of the relevant information, and she may have a high degree of confidence that the information she has gathered is accurate. Still, it would be troublesome if a mediator required full and complete information before engaging in a particular behavior.<sup>58</sup> Such a constraint would effectively lead to inaction by a conscientious mediator because she would recognize that she never had complete information.

Information asymmetries and imperfect information are a fact of bargaining in virtually all contexts. At times, the information asymmetry or imperfection is a function of benign, or at least, unintentional factors. In many other cases, the reality of mediation practice involves mediators receiving partial disclosures, "puffery," and even outright lying from the parties. Until this point, this Article has assumed that disclosure between each party and the mediator has been full and truthful.<sup>59</sup> This assumption is an ideal rarely, if ever, realized in practice for a variety of reasons.

Sometimes, parties will not convey whole or wholly accurate information to the mediator. Parties are human, and almost always suffer from the same perception problems that plague the rest of us. They are incapable of processing all of the information available to them, instead selecting and considering only a portion of what is really happening. Parties tend to perceive data according to biases they hold, filtering out disconfirming data and highlighting data that

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<sup>58</sup> This would be as true for prediction as it would be for many other mediation practices. For example, mediators frame issues, some generate options, and some pronounce evaluations—all without the benefit of truly complete and accurate information.

<sup>59</sup> I have not considered the possible information asymmetries that take place when the communication is not open. For example, if a mediator reveals her prediction to the parties in a setting other than a joint-session, the knowledge that the mediator's prediction is X will not be common knowledge. That is,  $\Pi$  will not know whether the mediator said the same thing to  $\Delta$ .

confirm their previously held beliefs.<sup>60</sup> Even if parties had perceived everything, they would be hard pressed to convey it in any meaningful way to the mediator and the other party. Timing and communication constraints necessarily prevent completely full disclosure, even when that is the speaker's intent. Furthermore, parties may, with the best of intentions, try to explain only those things they believe to be relevant, missing opportunities to fully explore an issue. Therefore, even when there are no reasons to believe that one or both parties intend not to reveal his perspective fully, a mediator should recognize that the information available is almost certainly incomplete, if not inaccurate.

Further complicating these considerations is the fact that parties also often engage in calculated, strategic behavior designed to create conditions of imperfect or incomplete information. A party may try to mislead the mediator or the other party about his actual reservation value, or about any number of other factors relevant to the dispute in question.<sup>61</sup> There is debate among observers of negotiation regarding the effectiveness of lying.<sup>62</sup> From a descriptive perspective, however, few would contend that parties do not sometimes *perceive* a benefit from misrepresentation. It is not surprising, therefore, that parties sometimes do not communicate entirely truthfully within the context of a mediation.

Mediation parties do not always tell the truth, and they certainly do not always tell "the whole truth." Parties to mediations generally take no oath regarding the veracity of their statements, and there is no risk of perjury charges

<sup>60</sup> RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 7–8 (1980); Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103, 117–18 (Edward S. Brown et al. eds., 1996).

<sup>61</sup> Gerald Wetlauffer has suggested:

[A negotiator] might lie about the nature, history, characteristics, or value of the property which is the subject of the negotiation . . . [A negotiator might also make] false promises, false threats, and false predictions related to the value of the property which is the subject of the negotiation. [And a negotiator might] lie about [their] client's opinions, characteristics, authority, interests and priorities, reservation price, or alternatives to agreement.

Gerald Wetlauffer, *The Ethics of Lying in Negotiation*, 75 *IOWA L. REV.* 1219, 1224–25 (1990); see also Lax & Sebenius, *supra* note 7, at 139–41 (describing typical categories of things about which parties mislead in negotiations).

<sup>62</sup> Compare ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 165 (1988) (asserting "the art of bargaining" is "in large part the art of" sending misleading messages about reservation values), and James White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 *AM. B. FOUND. RES. J.* 926, 928 ("[T]he critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled."), with SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 47–56 (1978) (suggesting that there is a fairly uniform tendency to underestimate the reputational, societal, and personal costs of lying).

linked to assertions made during a typical mediation.<sup>63</sup> As a result, the legal safeguards regarding the honesty of parties stem either from the professional codes of ethics that govern certain kinds of parties (like attorneys) or from the law of fraud.

For lawyers participating in a mediation process, state codes or rules of professional responsibility bar attorneys from making some misrepresentations on behalf of their clients.<sup>64</sup> However, there is a large category of information about which attorneys have no particular duty to disclose truthfully. For example, Model Rule of Professional Responsibility Rule 4.1 specifically provides in its comment that attorneys have no obligation to be truthful in discussing “[e]stimates of price or value placed on the subject of a transaction [or] a party’s intentions as to an acceptable settlement of a claim.”<sup>65</sup> Lawyers’ statements regarding reservation values, therefore, are not constrained by lawyers’ professional ethics.<sup>66</sup> There are also contexts in which attorneys’ duties to their clients will *prohibit* them from truthfully disclosing certain information. For example, a client may bar an attorney from revealing certain kinds of information, and an attorney cannot ethically break that confidence unless the nature of the information disclosed falls within a very narrow set of exceptions.<sup>67</sup> Under the current system of regulating attorneys’ behavior, therefore, there is

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<sup>63</sup> Some proceedings before neutrals contain more heightened protections against misrepresentations. Statements before a judicial tribunal or officer, for example, may expose the speaker to criminal charges of perjury if it is later learned that he “[w]illfully subscribes as true any material matter which he does not believe to be true.” 18 U.S.C. § 1621(2) (1994).

<sup>64</sup> See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102 (1998); MODEL RULES OF PROF’L CONDUCT R. 4.1 (1998).

<sup>65</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. (1998).

<sup>66</sup> It is important to note, however, that while an attorney has no duty to be truthful in statements regarding a reservation value, the law of fraud may serve as a bar on misrepresentations regarding the alleged “facts” that underlie the formation of that assertion. For example, a Massachusetts court held that it was fraud for a landlord to assert that his reservation value was increasing rent by \$10,000 *because he had a prospective tenant ready and willing to pay that rent* and would evict the current tenant immediately unless that tenant agreed to a similar increase. See generally *Kabatchnick v. Hanover-Elm Building Corp.* 103 N.E.2d 692 (Mass. 1952).

<sup>67</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (1998); MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1999).

only a partial effort to guarantee the veracity of statements made in the course of a mediation.<sup>68</sup>

The law of fraud applies to all parties engaged in bargaining, without regard to their professional affiliations. Like the professional responsibility provisions, however, it provides only partial guarantees regarding the veracity or completeness of statements from the parties. Succinctly, the common law of fraud holds that a negotiator may not make a knowing misrepresentation of a "material" fact on which the listener reasonably relies and which causes damage.<sup>69</sup> There have been few actions brought under the law of fraud with respect to agreements reached during mediations.<sup>70</sup> It is useful to note that the law of fraud provides very little protection with respect to the veracity of statements regarding many of the kinds of information this Article has considered. For example, reservation values are not considered to be "material" facts, making the law of fraud inapplicable.<sup>71</sup> Indeed, the notion of "puffery" is

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<sup>68</sup> Recognizing this, Kimberlee Kovach has proposed a "good faith" requirement on both parties and counsel engaged in mediation. Her proposed addition to the Model Rules would hold, "During the mediation, the lawyer shall not convey information that is intentionally misleading or false to the mediator or other participants." Kimberlee Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEXAS L. REV. 575, 622 (1997). Furthermore, she would provide a statutory basis for "good faith," one part of which would be defined as "making no affirmative misrepresentations or misleading statements to other parties or the mediator during the mediation." *Id.* at 623. This Article does not intend to treat the merits of her proposal, but it is important to note that no such requirements currently constrain parties or their counsel during the course of mediations.

<sup>69</sup> G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGT. REV. 93, 94–95 (1991); see also W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 728–29 (5th ed. 1984) (noting that *scienter* or an intention to induce action by means of the misrepresentation may be an additional element).

<sup>70</sup> Confidentiality provisions generally protect parties and mediators from having their mediation statements or actions examined by those not present in the mediation. Recognizing that this could promote fraud, most mediation confidentiality provisions now allow parties to disclose assertions or representations made during the course of a mediation in the course of an action alleging fraud on behalf of one of the parties. *E.g.*, UNIFORM MEDIATION ACT § 8(b)(2) (Reporter's Interim Draft Mar. 2000). Section 8(b)(2) allows an exception to confidentiality when:

[T]he evidence is offered in a proceeding in which fraud, duress, or incapacity is in issue regarding the validity or enforceability of an agreement evidenced by a record and reached by the disputants as the result of a mediation, but only regarding evidence provided by persons other than the mediator of the dispute at issue.

*Id.*

<sup>71</sup> For an outstanding and concise treatment of the application of the law of fraud to negotiation dynamics, see generally Shell, *supra* note 65.

treated as an acceptable and expected part of the bargaining process by the legal constraints on bargainers.<sup>72</sup> Therefore, while the prospect of an action under the common law of fraud may serve to prevent certain misrepresentations, it does not serve as any kind of guarantee that the parties will engage in fully open and truthful exchanges.

The fact that there are not specific legal guarantees of full and complete disclosure does not mean that mediation parties are necessarily engaged in misrepresentation and willful nondisclosure at every juncture. Many parties and counsel will decide to disclose with a greater degree of candor than the codes of ethics mandate. Some may even disclose more than is in their strategic interest. In some cases, mediators endeavor to secure non-binding undertakings from the mediation participants so that they will operate "in good faith."<sup>73</sup> Nevertheless, it is important to note that participants' statements or disclosures in a mediation are at least suspect.

Therefore, a mediator can never be fully confident that she has full, complete, and accurate information about all of the circumstances relevant to a dispute. The parties may not have perceived everything that was relevant originally. The parties may not recognize what is relevant and what is unimportant. The parties may have unintentionally communicated information imperfectly. They may also have endeavored to mislead the mediator or the other party about one or more aspects of the circumstances surrounding the dispute.

Rather than permit this recognizable imperfection in information to lead to inaction, practicing mediators should recognize that their lack of complete information merely leads to dampened certainty. A mediator attempting to set out an agenda that includes the necessary issues to be resolved in a dispute would be best served to make her proposed agenda tentative, allowing the parties to fill in where the mediator's information may have been incomplete.<sup>74</sup> A mediator formulating an evaluation of the likely non-settlement outcome may hedge her evaluation with a statement regarding some of the uncertainties surrounding any such endeavor. A mediator who believes she may have discovered a settlement option that would be attractive to both parties would necessarily check with the parties because she may have misunderstood their interests in a way that would prevent her from accurately gauging the parties' assessments of the option.

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<sup>72</sup> For a discussion of the statutory authority for and limits on the scope of "puffery," see generally Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. OF LITIG. 173, 178-84 (1989); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 76 IOWA L. REV. 1219, 1244-45 (1990).

<sup>73</sup> See Kovach, *supra* note 64, at 596-99.

<sup>74</sup> For a description of some of the variables that inform agenda creation and framing, see generally CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 213-30 (2d ed. 1996).



## AN EXPLORATION OF MEDIATORS' PREDICTIONS

With regard to prediction, the same dampened certainty is sensible. A mediator's prediction is a function of probabilistic projections based on partial information. In almost all circumstances, a mediator would be unable to form a prediction with complete certainty. In practical terms, this translates into statements with qualifiers (*e.g.*, "very likely to settle" or "unlikely to settle") rather than pronouncements of fact (*e.g.*, "will settle" or "will not settle").

### *B. Timing Prediction Formulation and Signaling*

When should predictions and prediction signaling take place? Intuitively, there seems to be a significant difference between a mediator making a predictive pronouncement within the first few moments of a mediation and one who forwards a prediction after she and the parties have engaged in considerable effort. Much of this difference stems from the fact that the passage of time in the mediation serves as something of a proxy for information. That is, as time passes, a mediator has a better sense of what information is important, can assess the accuracy of the information she has collected, has time to collect more information, and recognizes the information that is unavailable to her. Similarly, the parties have an increasingly good sense of how the information flows to the mediator and can, therefore, attach greater credibility to the mediator's prediction signal.<sup>75</sup>

These factors would suggest that mediators should not formulate or signal predictions until late in a mediation, when information is more complete. This practice would, at a minimum, serve to increase the accuracy of the predictions a mediator formulates. Those who make guesses about the likelihood of settlement toward the outset of the endeavor would almost certainly err more often than those who waited until they had fuller information. There may be credibility implications to premature predictions that will push mediators to want to predict later.

Accuracy in predictions is not necessarily the consideration that should drive mediators, however, and there may be very good reasons for a mediator to

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<sup>75</sup> These concerns about information accuracy form part of the rationale for Marjorie Corman Aaron's suggestion that mediators who engage in evaluation should do so only as a "last" measure. Marjorie Corman Aaron, *A Mediator's Soliloquy*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 63, 63 (1996).

formulate and signal predictions much earlier in a mediation.<sup>76</sup> Each mediator will surely have her own personal sense of the degree of confidence she would want to have before making *any* predictive signal. Most, however, will view the potential utility of formulating and signaling predictions as a function of far more than just the accuracy of the prediction.<sup>77</sup> The potential benefits of an influential prediction signal suggest that mediators should look to formulate predictions early and often in a mediation. By formulating them early, the mediator preserves the possibility of choosing to signal a prediction that is ultimately influential. By formulating them often, a mediator accounts not only for the imperfection of information noted in the section above, but also for the dynamic nature of the influences on parties in a mediation.

### *C. Prediction Plus: The Merits of "If . . . Then" Statements*

Until now, this Article has considered predictions in a way that separates prediction from the rest of a mediator's practice. The predictions discussed to this point have followed a simple formula: "I do (or do not) think this case is likely to settle." This analysis has treated the statement as wholly separate from all other things a mediator might do or say in connection with a statement to the parties. In a sense, these "naked" predictions have been treated as the *only* thing a mediator might do over the course of a mediation. A reader unfamiliar with the wide range of mediation practices might wrongly believe that this Article is suggesting that mediation is all about predicting settlement or non-settlement. The practice of mediation has many different aspects, and mediators are often called upon to do and say a wide range of different things over the course of a mediation. Mediators often isolate or frame issues, help to craft potential settlement options, aid the parties in engaging in productive dialogue by asking carefully crafted questions, and a whole host of other non-prediction activities that this Article has not considered. This Article has treated predictions as largely

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<sup>76</sup> Among the topics not considered in this Article is the question of impetus for prediction signaling. A mediator might, for example, choose to signal her prediction on her own initiative. In many respects, that is the paradigmatic signal considered in this Article. "I've been thinking about this case, and I think . . ." At the same time, she may receive a question from a party that prompts a predictive response. It is not uncommon for parties to turn to a mediator and inquire about the mediator's sense of the utility of continuing the mediation process. "Before we go forward with any of this, I have to ask, do you think this is worth it? Are we getting anywhere?" The response to such an inquiry could easily include a predictive signal.

<sup>77</sup> At the extreme, a mediator could almost certainly achieve a very high "batting average" or "success rate" if the only variable measured is the accuracy of her predictions. She could simply wait, predicting non-settlement only after impasse is reached or predicting settlement only after the parties have picked up the pen to sign the final agreement.

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separate from the rest of these activities, describing them as if they were naked interventions in which both the mediator and the parties play otherwise passive roles. To some extent, the predictions sound almost fatalistic—"It will (or it will not) settle regardless of what you or I do."

It is difficult to imagine that a mediator would purposely make a statement so wholly unconnected to the rest of her interactions with the parties, particularly when these statements risk having negative impacts on the parties' behaviors or perceptions. Instead, a mediator is most likely to articulate a prediction recognizing that the prediction is both based on incomplete and potentially inaccurate information and a function of projection into the future. That is, the prediction is formed when neither settlement nor terminal impasse has yet occurred. The prediction is, in part, the mediator's best guess estimate about settlement likelihood, given what has happened so far.

The formula for prediction signaling most likely to be conducive to this environment is one that takes the form of an "If . . . then" statement. There are at least two significant variables a mediator may include in the formation of her prediction (also noting the assumptions listed above). First, a mediator considers a range of *information* disclosed to her by the parties over the course of the mediation, which the mediator determines to be relevant to the formation of a prediction. Second, a mediator observes some of the *behavior* between the parties, and her prediction may be a function of those observations. A mediator could choose to make either or both of these sets of information explicit in the process of conveying her prediction to the parties. The following sections explore the potential merits of a mediator being transparent<sup>78</sup> about each of these variables. The basic formula for signaling prediction under this construct, then, would be as follows: "If [this condition is true or persists] then [my prediction is X]."

### 1. *If [information is correct] Then . . . [prediction]*

A mediator might choose to share with the parties not only her prediction, but also the set of information she has gathered in order to form that prediction. A mediator could choose to be explicit in this way whether she had formulated an optimistic prediction or a pessimistic prediction.

One possible benefit for mediators of being explicit about the information set in question is that it may serve to decrease some of the parties' incentives to

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<sup>78</sup> In an earlier article, I suggested that mediator "transparency"—the practice of a mediator sharing her thoughts with the parties on a range of topics—may hold particular advantage for mediators in some contexts. See generally Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?* 13 OHIO ST. J. ON DISP. RESOL. 1 (1997).

engage in strategic misrepresentation. For example, a mediator might say, "If the reservation values you have each revealed to me privately are accurate, then I am extremely pessimistic that we will arrive at a settlement in this case."<sup>79</sup> The mediator could have simply signaled that she was pessimistic that the parties would be able to find a settlement. The addition of the conditional statement indicates to the parties the basis for the mediator's prediction. Implicit in this indication is an invitation to one or both of the parties to "correct" the mediator's understanding of the relevant information, lest the mediation reach no settlement.<sup>80</sup>

In another example, a mediator might say, "If I understand correctly that X is the only issue left to resolve, then I believe we are very likely to arrive at a settlement here." The potential benefit of a statement like this one is that it may serve to focus the parties' efforts on the topic X, identified by the mediator as being the issue to resolve. The carrot the mediator is offering—settlement—is in many cases the thing the parties were seeking in entering the mediation in the first place. On the other hand, a statement like this one risks inviting the parties to amend the information in question, in this case by telling the mediator that there are other issues to be resolved beyond X. It also risks creating an incentive for both parties to dig their heels in on what they now know to be the last issue on the table.

## *2. If [behavior continues] Then . . . [prediction]*

A mediator could also choose to be explicit about the behavior she is observing and share her projection of the implications of continuing that dynamic between the parties.

For example, a mediator might say to the parties, "If you both continue to uphold our agreed upon prohibition against public statements or leaks to the press, I think we should be able to sustain this level of progress and arrive at a solution." The potential benefit of such a statement would be that the parties would have an explicit understanding of the behavior the mediator believes will lead to the predicted outcome. In this case, the parties would understand that the

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<sup>79</sup> A statement like this may implicate the confidentiality guarantees attached to the parties' caucuses with the mediator. It is not implausible, however, that a mediator could have secured permission to use the information in a non-specific way such as this.

<sup>80</sup> Under the original assumptions of full, open and truthful exchange, there would be no need for disclosure of the information set(s) in question. A mediator would have no reason to believe that the information would (or could) change in any way, so a naked prediction would suffice. In the real world, in which parties lie or exaggerate in portions of their statements to mediators, there may need to be a vehicle for mediators to allow parties to re-open assertions they have made previously.

mediator believes that continued adherence to a particular gag rule is a key to arriving at an acceptable settlement.

A mediator might be even more inclined to employ this construct in cases when she has developed a pessimistic prediction. In that case, the mediator would be seeking to admonish the parties from continuing the behavior she identifies. Such statements may focus on very specific behavior. For example, a mediator may say, "If the two of you continue to interrupt each other and insult each other personally, I believe it will be impossible for us to arrive at a settlement." A mediator could also use this formula for addressing structural or systemic behaviors. For example, a mediator might say, "If you two continue to refuse to involve the principals in these discussions, I don't think we'll end up resolving any of the tough issues on the table." In both of these cases, the parties are given not only the mediator's prediction, but also a specific indication of the behaviors that would have to change in order for the prediction to change.

### *D. For What Purpose?*

There are some tasks mediators appear to do without thinking about the ultimate purpose behind the activity. Some mediators appear to have their introductory statements so finely tuned that the beginning of their mediations are consistent, regardless of circumstance. Others seem to jump in and out of caucus merely because they "didn't know what else to do." Such practices are probably not ideal in any circumstance. When the tasks in question hold little risk of negative impact on the parties, however, mediators may be able to "get away with" this less than purposive behavior.

It is not easy to formulate a thoughtful prediction, and it is not easy to figure out how best to signal a prediction once it is formulated. The complexities involved and the potential risks associated with prediction signaling suggest strongly that a mediator should have a particular purpose in mind before engaging in predictive behavior in the mediation. Given the potential risks and rewards involved in prediction signaling, the practice of formulating and sharing predictions is neither a universally helpful move, nor a universally inappropriate move. In some cases, it may not be helpful at all. In others, it may provide useful information to the parties at multiple stages of the discussions. It seems wisest for a mediator to consider predictions and prediction signaling only when she can formulate for herself a specific rationale—a story about why prediction signaling would be useful to the parties at that moment.

## VI. OBJECTIONS TO MEDIATOR PREDICTION

Prediction, as defined in this Article, has not been treated by mediation literature, and it is likely that some within the mediation community will view the practice of prediction signaling as ill-advised, or worse. The following sections anticipate a primary set of arguments from critics and suggest at least brief responses to those objections.

*A. Think No Evil: Do Not Even Formulate a Prediction*

There are at least two reasons why some within the mediation community might argue that it is inappropriate for mediators to even formulate predictions, let alone signal them to the parties. The first of these arguments is utilitarian. The second stems from a specific vision of the mediation process and its goals.

Prediction formulation and signaling are not costless, and it is no guarantee of improved results. There are likely to be those within the mediation community who will consider the merits of prediction formulation and signaling, assess the potential benefits and costs associated with it, and ultimately judge that its potential payoff cannot warrant the effort it demands or the risks it may create. They will judge that mediators would better serve the parties by focusing on other aspects of the mediation, rather than focusing on the question of the likelihood of settlement. Their vision of "best practice" for mediators, therefore, would be not to even invest the energy required to formulate a prediction.

This utilitarian objection is well-founded, but overstates the scope of the objection. There are mediation circumstances in which the parties would not be served in any particular way by a prediction signal. A prediction signal would, at most, be inconsequential, and the parties would be best served by having the mediator focus her efforts elsewhere. At the same time, it seems extremely unlikely that a mediator could declare *ex ante* that no parties would ever alter their behavior or decisions based on a predictive statement from the mediator. Furthermore, it is at least plausible that a mediator could figure out a way to frame her prediction signal in a way that minimizes some of the potential risks outlined in earlier sections. Assuming this is true, there are some circumstances in which prediction could serve the parties' interests well. At most, therefore, this utilitarian objection suggests that mediators should not blindly engage in prediction in all cases, but it does not follow that mediators should never engage in prediction.

A second set of objections to prediction may arise from those mediation practitioners and scholars who have developed a particularized vision of what constitutes "good mediation." Mediation scholars have defined "good" both in

the negative and in the positive.<sup>81</sup> An example of a negative definition of "good mediation" is found in some of the criticism leveled against the practice of evaluation within mediation. Often, these criticisms conclude that "good mediation" practice can include a range of different approaches, as long as none of them is evaluative.<sup>82</sup> For adherents to these definitions of "good mediation" practice, it is unclear what their response would be to the prospect of mediators engaging in prediction. Because prediction has not before been discussed, there is no "negative definition" of "good mediation" that would preclude prediction.

An example of a positive description of "good mediation" may be found in the "transformative" approach to mediation, suggested by Bush and Folger.<sup>83</sup> It is a positive description in the sense that Bush and Folger define specifically what the approach and practices of the mediator should include. It is much easier to assess the fit between the practice of prediction signaling and the model they forward because they have offered such a strict list of "appropriate" mediator activities. In brief, Bush and Folger suggest that mediators should limit their activities within a mediation to those things that are designed to "empower" and those things designed to encourage "recognition." It is difficult to imagine prediction signaling falling within either of these two categories, making it most likely that adherents to this vision of mediation would object to the practice of prediction signaling.

In fact, the objection to prediction from proponents of the transformative model of mediation is likely to extend beyond a mere admonition against signaling. Instead, they would be most likely to object that the prediction framework itself runs counter to the underlying principles involved in "good mediation." Proponents of transformative mediation specifically criticize all approaches to mediation that hold a problem-solving framework as their foundation. Instead, Bush and Folger suggest that the mediator should focus her efforts on helping to empower the parties and on helping them to recognize the

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<sup>81</sup> I do not use the terms "negative" and "positive" in any normative sense, and I certainly would not suggest that I prefer the latter to the former. Instead, I mean to suggest only that some have developed descriptions that focus primarily on what good practice *is not*, and these I label as defining good practice in the negative.

<sup>82</sup> E.g., Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997) ("The current most heated debate concerns the question of whether mediation is facilitative or evaluative or both."); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 480 (2000). A similar, though less acrimonious debate has sometimes taken place over the so-called "facilitative vs. directive" debate regarding a mediator's role with respect to the development of potential settlement options.

<sup>83</sup> See generally ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *TRANSFORMATIVE MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

perspectives of others.<sup>84</sup> Because prediction formulation specifically hinges on the question of settlement or problem-solving, it would surely run afoul of transformative mediation's focus.<sup>85</sup> For these reasons, proponents of transformative mediation would not only caution a mediator against signaling prediction, but also urge her to engage in an almost Zen-like effort not to ask herself any questions that might lead her to formulate a prediction in the first instance.

While it is tempting to enter the debate around this particular conception of mediation, this Article is not the appropriate forum for doing so. For now, assume that prediction formulation is inconsistent with the vision of mediation proposed by Bush and Folger. Even if this assumption were true it would only serve to place prediction outside the realm of accepted practices in one conception of mediation. It does not follow that prediction is inappropriate in all forms of mediation in all contexts, unless one is willing to accept a single, universal definition of "good" mediation practice.

### *B. Speak No Evil: Do Not Signal Your Predictions Even If You Have Formulated One*

Even among the group of mediation scholars or practitioners who believe that prediction formulation is either inevitable or useful, there are likely to be those who nonetheless believe that a mediator should not share or signal her predictions to the parties. Again, there are at least two different rationales for this kind of general objection—a utilitarian perspective, and a potential ethical objection.

From a utilitarian perspective, there will surely be those who formulate predictions themselves, but conclude that it would not serve the parties' interests for them to signal or reveal those predictions. Pointing to the uncertain nature of the predictions, and the even more uncertain nature of the impacts of signaling those predictions, some will certainly opt to leave prediction signaling out of their repertoire of mediator practices. As with the response to the utilitarian

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<sup>84</sup> *Id.* at 55–77. For an interesting analysis of the claims made by Bush and Folger about mediation's capacity to be transformative, and about the degree to which transformative mediation achieves its own stated goals any more effectively than traditional problem-solving approaches to mediation, see generally Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135 (1999).

<sup>85</sup> See Patricia L. Franz, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO ST. J. ON DISP. RESOL. 1039, 1043–45 (1998) (stating that transformative mediators must let go of the idea of "settlement" or "resolution" at the end of one or more mediation sessions in order to focus effectively on party self-determination and growth).



argument framed above, this objection is potentially correct, but overstated. Indeed, there will certainly be circumstances in which prediction signaling would be inappropriate or non-strategic. It does not follow that it will *always* be inappropriate or non-strategic. There are conditions in which the parties would be well served to have access to the information that would be provided through a prediction.

Even among those who believe that prediction formulation and signaling can be a useful practice, it is unlikely that anyone would advance an argument that a mediator should *always* share her prediction. There are contexts in which it would be extremely likely to be unhelpful, if not harmful. There are times when a mediator might prefer to hold her prediction until she has more information. There will certainly be times when a mediator will collect further information, causing a slight adjustment in her prediction about the likelihood of settlement, but she will not want to share her revisions each time she learns a new piece of information. There is currently no vision of a mediator who is so wholly transparent that she signals or shares everything that she is thinking.<sup>86</sup> The practice of signaling predictions, at most, is a specific step a mediator may opt to take at various points in a mediation.

A second possible objection to the practice of signaling a prediction stems from a particular conception of mediator ethics. Some may object that the practice of prediction signaling threatens the parties' self-determination with respect to the outcome of the mediation.<sup>87</sup> One concern would be that the mediator may be inappropriately influencing the outcome of the mediation in a way that threatens the parties' self-determination. Self-determination concerns generally focus on mediators who induce *specific* outcomes of some sort, rather than the mere fact of settlement.<sup>88</sup> Nevertheless, there is a slippery slope between a mediator engaging in behavior designed to produce a specific result, and

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<sup>86</sup> I have argued in different contexts that mediators ought to consider carefully the merits of increasing the degree to which they share their own thoughts. *See, e.g.*, Moffitt, *supra* note 74 (urging transparency about the processes mediators intend to adopt or about the impact they hope to have on the parties); Michael Moffitt, Mediator Transparency Workshop, CPR Institute for Dispute Resolution, Santa Fe, NM (June 8, 1999) (materials on file with author) (suggesting that mediators ought to consider transparency regarding their observations or diagnoses of the dynamics between the parties).

<sup>87</sup> Self-determination is widely recognized as a principle underlying mediation in most contexts. *E.g.*, Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 101–03 (1997); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 711 (1994).

<sup>88</sup> *E.g.*, Henikoff & Moffitt, *supra* note 87, at 103; Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, NIDR REPORT 15–19 (1992).

behavior designed merely to induce a settlement—on any terms. For example, there have been reports of some mediators who engage in caucusing with parties in which they try to strong-arm one side into offering more, and then caucus with the other side and try to strong-arm them into accepting less. If a mediator not only signaled her prediction regarding the likelihood of settlement, but also signaled the specific terms of the settlement she thought would ultimately result, it would raise considerable self-determination concerns. With simple prediction signaling, as described in this Article, it is not clear that the practice would in any way violate the ethical norms that have developed around mediation practice.<sup>89</sup>

Critics may also suggest that the parties' informed consent may be threatened if they did not expect the mediator to be providing predictive assessments. Informed consent constitutes a generally accepted pillar of mediation ethics, and it typically contains at least two components. The first is the idea that parties must consent to the substance of the outcome. A mediator cannot impose a particular decision on the parties; they must understand the deal and accept it or else there is no agreement. The second aspect of informed consent provides that parties must understand and agree to the mediation process itself.<sup>90</sup> If, therefore, the parties did not believe that a mediator would ever make a predictive statement and consented to the mediation process under that belief, then there may be reason to have concern around the degree to which the parties' informed consent has been protected. Still, this objection does not appear to be fatal to the practice of mediator prediction. It may suggest that notice should be given, or that the parties should have an opportunity to preclude predictive signals from the mediator if they do not want them. The same could be said, however, of most mediator practices. If the parties do not expect practice X (whether it is prediction, suggestions of possible settlement outcomes, evaluations, or caucusing), the mediator may need to negotiate with the parties about the practice either before the mediation or online, just before the practice is adopted. Informed consent, by its nature, permits consent under certain conditions. Therefore, at most, this objection would serve to limit the circumstances under which mediators engage in prediction.

Finally, there may be those who worry that the practice of prediction signaling may create a risk that parties will no longer perceive the mediator as neutral. While it is commonly held that a mediator should maintain "neutrality" or "impartiality" of some sort, the exact scope or nature of that requirement has

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<sup>89</sup> There is currently no single statement of mediator ethics. I have argued that even those ethical frameworks that do exist have suffered some critical deficiencies. See Henikoff & Moffitt, *supra* note 83; Panel Discussion: Mediating Ethically: A Critical Perspective at the Dispute Resolution Annual Conference (Oct. 17, 1999) (audio tape, on file with author).

<sup>90</sup> Henikoff & Moffitt, *supra* note 87, at 103–04.

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been less than precise.<sup>91</sup> This Article does not intend to address that broader debate. The concern, however, would be that a party might believe that a mediator's prediction signal constituted a breach of a duty not to favor one party over the other. If a mediator signaled an optimistic prediction immediately following an impassioned series of threats one party made against the other, the party who made the threats may perceive the mediator's actions as having undermined the effectiveness of his negotiation strategy. In practice, it seems likely that virtually any mediator action may have an impact on the outcome in some way that favors one party, the other, or both. While there may be reason to question the basic notion of neutrality within mediation, it is not clear that there are any reasons why prediction signaling would be any more problematic than a host of other potential mediator practices.

## VII. CONCLUSION

Many mediators wonder about the likelihood that the case in front of them will reach a settlement, and some choose to share their assessment of this likelihood with the parties. This practice is largely untreated in the traditional mediation literature, and it raises both utilitarian and ethical questions. This Article suggests that the impacts of prediction formulation and signaling are complex enough that it would be difficult to describe a single impact from a mediator's decision to formulate and signal a prediction. As with many mediation practices, the mediation community would benefit from a more thorough exploration of the various issues surrounding prediction and prediction signaling. There are many circumstances, however, in which mediators can serve the parties well by formulating and sharing the contents of their predictive observations.

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<sup>91</sup> E.g., Leda M. Cooks & Claudia L. Hale, *The Construction of Ethics in Mediation*, 12 *MEDIATION Q.* 55, 62–63 (Fall 1994) (describing one conception of the distinction between “neutrality” and “impartiality”); KEVIN GIBSON, *SOME ETHICAL PROBLEMS IN MEDIATED DISPUTE RESOLUTION*, 82–129 (University of Colorado, Working Paper No. 92–9, 1992) (outlining a broader spectrum of neutrality issues in mediation and their links to specific mediator practices and orientations).

